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IN THE

Supreme Court of the United States

JORGE L. GARIB BAZAIN,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Section 666 of Title 18 of the United States Code makes it a federal offense to steal or embezzle from an organization that "receives" more than $10,000 a year in federal "benefits." In this case, Dr. Jorge L. Garib Bazain was convicted of conspiracy to violate Section 666 for paying personal expenses with funds belonging to a corporation that, although it did not itself receive federal benefits, was paid by a municipal government that did.

The first question presented by the petition is: Whether the First Circuit correctly held—in conflict with this Court's decisions and its sister circuits—that a private organization that does not itself receive benefits under a federal program is nonetheless covered by Section 666 because it receives payments from an entity that does?

2. In *Taylor* v. *Louisiana*, 419 U.S. 522, 528 (1975), this Court held that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." The District Court below, sitting in Puerto Rico, systematically excluded from the jury otherwise qualified jurors simply because they were not proficient in English.

The second question presented by the petition is: Whether, in Puerto Rico, systematically excluding individuals from a criminal jury due solely to a lack of proficiency in English violates the Sixth Amendment, when the technology to conduct simultaneous translation is readily available and is used in trials throughout the country?

PARTIES TO THE PROCEEDINGS

Petitioner Jorge L. Garib Bazain was a defendant and an appellant below. Luis Dubón Otero, represented by separate counsel, was also a defendant and an appellant below. We have been advised that Mr. Dubón Otero will file a separate petition for certiorari seeking review of the decision below.

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PETITION FOR A WRIT OF CERTIORARI

Jorge L. Garib Bazain respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the First Circuit affirming the District Court's judgment of conviction and sentence is reported at 292 F.3d 1 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court denying Dr. Garib's motion for acquittal or new trial is unreported and is reprinted at App. 34a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 2002. App. 1a. A timely petition for rehearing and

rehearing en banc was denied on July 23, 2002. App. 49a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 666 of Title 18 of the United States Code provides in pertinent part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> > (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
> >
> > > (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
> > >
> > > (i) is valued at $5,000 or more, and
> > >
> > > (ii) is owned by, or is under the care, custody or control of such organization, government, or agency
> >
> > * * *
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

The Spending Clause of the United States Constitution provides: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *."

INTRODUCTION

This case concerns the reach of federal criminal jurisdiction under the Spending Clause. Although theft and embezzlement are not, as a rule, federal offenses, Section 666 of Title 18 of the United States Code converts them into federal crimes where the target is an organization that "receives" more than $10,000 in federal "benefits." Federal jurisdiction thus hinges on identifying a proper recipient of federal benefits.

Petitioner Jorge L. Garib Bazain was convicted of conspiracy to violate § 666 for having embezzled from a private corporation that did not itself receive federal benefits but was paid for services by an entity that had received a subgrant from yet another entity that had received a federal grant. A panel of the First Circuit held that an organization "receives" federal "benefits" whenever it is simply reimbursed with money that can ultimately be traced to a federal grant, so long as the organization provides a service that in some way promotes the goals of the federal grant program. That ruling directly conflicts with this Court's decision in *Fischer* v. *United States*, 529 U.S. 667 (2000), as well as this Court's precedents limiting the reach of other statutes enacted pursuant to the Spending Clause that use analogous federal-funding triggers. By employing a "broad, almost limitless use of the term" recipient of federal benefits, the rule adopted

by the court below "would turn almost every act of fraud * * * into a federal offense, upsetting the proper federal balance." *Id.* at 681. Moreover, the decision exacerbates an already entrenched circuit split over just how much of a federal interest the Spending Clause requires to justify prosecutions of what would otherwise be purely local crimes under § 666. This Court should grant certiorari to resolve the multiple conflicts on the important question presented.

This case also raises an important Sixth Amendment issue: whether systematically excluding non-English speakers from federal juries in criminal trials in Puerto Rico—a jurisdiction in which a majority of the population does not speak English—violates a defendant's right to be tried by a jury selected "from a representative cross section of the community." *Taylor* v. *Louisiana*, 419 U.S. 522, 528 (1975). That exclusion cannot be reconciled with this Court's precedents.

STATEMENT OF THE CASE

1. Doctor Jorge L. Garib Bazain is an infectologist, noted for his work with HIV and AIDS, who established a successful medical practice in San Juan, Puerto Rico. From 1988 until 1990—the timeframe at issue in this case—Dr. Garib was a principal shareholder and director of Advanced Community Health Services ("ACHS"), a closely held, for-profit corporation incorporated in Puerto Rico.[1] During Dr. Garib's tenure with ACHS, the corporation generated millions of dollars in revenue, with roughly $3.2 million a year coming from a contract with the Municipality of San Juan to provide AIDS counseling and professional services to residents of the Municipality.

2. In 1997, a federal grand jury handed down a multi-count indictment against a number of individuals for stealing

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[1] Dr. Garib had a 20% stake in ACHS, while his codefendant below, Luis Dubón Otero, and another doctor, Salomon Asmar, each held 40% of the corporation's stock.

and embezzling from ACHS. Dr. Garib was not named in that indictment, nor in the two superseding indictments that followed, but was ultimately charged in a third superseding indictment (along with Dubón) with conspiracy to violate 18 U.S.C. § 666.[2] The extent of Dr. Garib's participation in the conspiracy was limited to allegations that he converted some of ACHS's revenues for his own personal use, including: contributing to candidates running for local Puerto Rican office, lending a video camera purchased by ACHS to a San Juan mayoral candidate, and adding a housekeeper hired to clean his residence to the ACHS payroll.

But because theft and embezzlement are not, generally speaking, federal crimes, the government had to charge—and prove—more than garden-variety misappropriation. Rather, to establish federal jurisdiction over Dr. Garib's otherwise parochial offenses under § 666, the government had to demonstrate that ACHS—the organization from which Dr. Garib allegedly stole—had "receive[d] * * * benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b).

To carry its burden, the government pointed to two related payments—one for $70,680 in 1989 and the other for $99,279 the next year—that ACHS received to operate an assessment and intervention center for drug addicts in San Juan. The problem was that both of these payments came to ACHS not from the federal government, but from the Municipality of San Juan.[3]

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[2] Dr. Garib was also charged with and convicted of perjury for testimony he gave to the grand jury, in violation of 18 U.S.C. § 1623.

[3] These payments were in addition to the annual $3.2 million contract between ACHS and the Municipality for general AIDS counseling.

Despite this purely local transaction, the government alleged that federal jurisdiction was nonetheless proper under § 666 because the money ACHS received from the Municipality could eventually be traced back to a federal source. According to the government, the fact that ACHS was ultimately paid from funds that were at one time disbursed under a federal grant, and which then went through a series of nonfederal intermediaries, transformed ACHS into an organization that "receive[d] * * * benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b).

The government's trickledown explanation for why ACHS was a recipient of federal benefits began with a $3,795,172 grant from the National Institute on Drug Abuse ("NIDA"). NIDA, a federal agency under the auspices of the Secretary of Health and Human Services, awarded the grant to the Department of Anti-Addiction Services, an agency of the Commonwealth of Puerto Rico. The Commonwealth, in turn, passed along a small portion of the grant money to the Municipality of San Juan, with which the Municipality was to provide laboratory, intervention, and community-outreach services to residents of San Juan. The Municipality then in turn entered into a subcontract with ACHS, under which ACHS did nothing more than make some of its employees available to assist the Municipality in providing those services. Purely as compensation for this arrangement, ACHS received from the Municipality the two payments for $70,680 and $99,729 that the indictment characterized as the receipt of federal benefits—a characterization that transformed the allegations of local self-dealing against Dr. Garib into a federal case.[4]

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[4] The government also alleged that two other transactions led ACHS to receive federal benefits. In one, the Centers for Disease Control had contracted with the Municipality of San Juan to test members of the public for AIDS. The Municipality then subcontracted that work to ACHS, which received $11,862.14 for its services. In the other transaction, ACHS was paid $100,000 by the

3. The case proceeded to trial on January 10, 2000. Both before trial and at the close of the government's case, Dr. Garib moved for dismissal or acquittal on the § 666 charge, arguing that the money ACHS received from the Municipality plainly did not constitute the receipt of federal benefits. Moreover, Dr. Garib argued that, to convert those Municipal payments into federal benefits simply because a portion of those funds may have come from a distant federal grant would impermissibly transform every act of theft and embezzlement into a federal offense, a result Congress never intended.

Dr. Garib also argued that the District Court unconstitutionally deprived him of a petit jury selected from a fair cross-section of the community. Specifically, Dr. Garib maintained that, as applied to trials conducted in Puerto Rico, the general rule prohibiting individuals from serving on federal juries if they are not proficient in English, *see* 28 U.S.C. § 1865(b)(2)-(3), systematically excludes a substantial number of otherwise qualified citizens—particularly the poor.

The jury returned a guilty verdict. On March 3, 2000, the District Court rejected Dr. Garib's timely post-trial filings, in which he renewed his arguments for acquittal and sought, in the alternative, a new trial. App. 28a.

Municipality for work relating to a mass-media education project on AIDS. The government maintained that this payment constituted receipt of federal benefits based solely on "testimony from a municipal official that this payment had its source in federal funds, which passed through the Puerto Rico Department of Health to the Municipality." App. 8a. Because the Court of Appeals limited its analysis to the NIDA grant, neither of these other transactions is at issue here. *Id.* 10a n.9 ("We thus need not decide the character of the Centers for Disease Control or mass-media education project payments."). In any event, these transactions fail to satisfy the jurisdictional prerequisite under § 666 for the same reasons the payments on which the Court of Appeals rested its holding do.

4. On appeal a panel of the First Circuit affirmed. Recognizing that this Court's decision in *Fischer* v. *United States*, *supra*, had, under one set of facts, "addressed the issue of what constitutes receipt of benefits under § 666," App. 8a, the Court of Appeals devoted most of its analysis to summarizing that decision. After stating *Fischer*'s holding—"that § 666 'covers fraud perpetrated on organizations participating in the Medicare program,' " *id.*—the panel recited the test this Court established there:

> To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program. [*Id.* 9a (quoting *Fischer*, 529 U.S. at 681).]

The Court of Appeals went on to note that, under this rubric, hospitals were deemed recipients of federal benefits in *Fischer* because "monies paid included sums to enhance the hospitals themselves," and because the Medicare regime "placed conditions on recipient hospitals, 'unlike the case of a contractor whom the Government does not regulate or assist for long-term objectives or for significant purposes beyond performance of an immediate transaction.' " *Id.* (quoting *Fischer*, 529 U.S. at 680).

Despite its otherwise lengthy exposition of *Fischer*, the First Circuit mentioned only in passing the fundamental limitation established by that decision. As the panel observed, this Court in *Fischer* "refused to endorse the notion that all that was required for funds to constitute benefits under § 666 was to establish that they came from a federal program." *Id.* 10a.

Although accurately reciting this key principle, the Court of Appeals paid no heed to it once it began evaluating whether the money paid to ACHS by the Municipality of San Juan constituted receipt of federal benefits. Instead, the panel thought it enough that the payments received by ACHS boasted a federal pedigree. According to the Court of Appeals, "[o]ne of [NIDA]'s goals in making grants is to 'insure care of good quality, in general community facilities.' " *Id.* 11a (quoting 21 U.S.C. § 1177(f)). From that unremarkable premise the court drew a startling conclusion: that NIDA therefore "would naturally intend its monies to assist [ACHS] in providing AIDS care," thereby rendering ACHS—and any subcontractor for that matter—a recipient of federal benefits just for being reimbursed for providing services to a nonfederal entity. *Id.* at 12a. Moreover, based on the testimony of a civil servant with the Department of Health and Human Services, who opined that federal grants implicitly establish a relationship between the federal government and every subgrantee and subcontractor who comes in contact with the federal money, the First Circuit claimed to find further support for its ruling that ACHS received federal benefits. *Id.* at 13a. In short, the court reasoned that "if the payments in *Fischer* were 'made not simply to reimburse,' then neither were the payments here." *Id.* (quoting *Fischer*, 529 U.S. at 679).

The panel also rejected Dr. Garib's challenge to the policy of excluding non-English speakers from the jury. *Id.* 26a. Although acknowledging that " 'the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial,' " *id.* (quoting *Taylor* v. *Louisiana*, 419 U.S. at 528), the court relied on its earlier precedents holding that " 'the overwhelming national interest served by the use of English in a United States court * * * justifie[d] conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language.' " *Id.* (quoting

United States v. *Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995)).

Dr. Garib filed a timely petition for rehearing and rehearing en banc, which was denied on July 23, 2002. *Id.* 43a.

REASONS FOR GRANTING THE WRIT

The First Circuit's decision in this case conflicts with the precedents of this Court on an important issue that federal courts regularly—and, given the radical expansion of prosecutions under § 666,[5] increasingly—face: whether it is a federal crime to steal or embezzle from a local business that does not itself "receive[]" financial "benefits" under a federal program, but is paid for services by an entity that does. The Court of Appeals resolved that question affirmatively, and in doing so, departed from not only *Fischer* but also decisions of this Court delineating what it means to be a recipient of federal assistance under analogous civil statutes enacted—like § 666—pursuant to Congress's Spending Clause power. *See National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 468-470 (1999); *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 610 (1986). And by ignoring this Court's precedents, the First Circuit not surprisingly adopted a rule that conflicts with decisions from the other courts of appeals.

In addition, the First Circuit fundamentally misapplied this Court's precedents in holding, contrary to *Taylor* v. *Louisiana*, 419 U.S. at 528, and its progeny, that a federal court sitting in Puerto Rico may, consistent with the Sixth Amendment's guarantee of a petit jury selected from a fair

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[5] *See* George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 248-249 (1998) (noting the "extraordinary recent development" in prosecutions under § 666 and the corresponding rise in prosecutions of traditionally "local" corruption through § 666).

cross-section of the community, exclude from the jury individuals not proficient in English.

I. The Court Should Grant The Petition To Clarify That An Organization That Does Not Itself Receive Federal Benefits, But Is Paid By An Entity That Does, Is Beyond The Scope Of § 666.

A. The Decision Below Conflicts With This Court's Precedents Establishing When An Organization "Receives" Federal "Benefits."

A principal consideration governing the exercise of this Court's certiorari jurisdiction is whether a court of appeals "has decided an important question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The First Circuit decision in this case conflicts with this Court's decisions in *Fischer*, *NCAA*, and *Paralyzed Veterans*. The Court should grant the petition to resolve this conflict.

1. The question presented in *Fischer* was whether hospitals participating in the Medicare program "receiv[e]" federal "benefits." 529 U.S. at 669. To resolve that inquiry, this Court examined Medicare's "structure, operation, and purpose." *Id.* at 681. Distinguishing situations in which an organization is simply reimbursed for providing services to the government, this Court observed that "Medicare operates with a purpose and design above and beyond point-of-sale patient care," *id.* at 677-678, and that "[b]y reimbursing participating providers for a wide range of costs and expenses, * * * ensure[s] that providers possess the capacity to render, on an ongoing basis, medical care to the program's qualifying patients." *Id.* at 680. Moreover, the Court noted that, unlike typical commercial transactions between government and business, the Medicare program subjects participating hospitals to pervasive regulation and oversight. *Id.* at 680. Because these factors combined to "reveal a comprehensive federal assistance enterprise aimed at ensuring the

availability of quality health care for the broader community," *id.*, the Court concluded that "[t]he funds health care organizations receive for participating in the Medicare program constitute 'benefits' within the meaning of 18 U.S.C. § 666(b)." *Id.* at 681.

In reaching this narrow holding, however, the Court notably rejected "the Government's broader position." *Id.* at 677. Advocating the same rule that the First Circuit effectively adopted below, the Solicitor General in *Fischer* had argued that "whether an organization receives 'benefits' within the meaning of § 666(b) turns on whether the Federal Government was *the source* of the payment." *Id.* at 676-677 (emphasis added). In other words, under the government's proposed test, "the 'federal-program source of the funds' " would be enough on its own to "satisfy[y] the benefits definition." *Id.* at 677 (quoting U.S. Br., *Fischer* v. *United States*, No. 99-116, at 11).

This Court flatly rejected the government's expansive view because Congress never intended that "federal funds disbursed under an assistance program w[ould] result in coverage of *all* recipient fraud under § 666(b)." *Id.* at 681 (emphasis added). *See also* S. REP. NO. 98-225, at 370 (1983) ("[N]ot every Federal contract or disbursement of funds would be covered [under § 666]. For example, if a government agency lawfully purchases more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier a Federal crime."). As this Court recognized, because "[a]ny receipt of federal funds can, at some level of generality, be characterized as a benefit," *Fischer*, 529 U.S. at 681, it takes more than simply identifying a federal source of funding to vest the federal judiciary with jurisdiction over inherently local offenses. Were it otherwise, § 666 "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Id.*

The First Circuit's decision is plainly at odds with the principles established in *Fischer*. The Court of Appeals considered ACHS a recipient of federal benefits simply because the federal source for the money ACHS received—the NIDA grant that went first to the Commonwealth, then to the Municipality, and finally on to ACHS—was intended to "insure care of good quality[] in general community facilities." App. 11a (quoting 21 U.S.C. § 1177(f)). And since ACHS was providing the Municipality with AIDS services, the federal government "would naturally intend its monies to assist [ACHS] in providing AIDS care." *Id.* 12a. But that syllogistic view of how § 666 operates is really no different from what the government advocated—and this Court rejected—in *Fischer*: that recipient status turns solely on whether the federal government was the source of the payment. That is because every federal agency that issues a grant surely intends that the money it disburses will be used to promote the program's specific goals, and, by extension, assist the various entities called upon to accomplish those objectives. Yet to say that those entities therefore "receive" federal "benefits" simply because they are paid with funds that can be traced to some federal source—no matter how remote—is to reduce the jurisdictional inquiry under § 666 to a "level of generality" this Court eschewed in *Fischer*. 529 U.S. at 681.

The First Circuit's analytic abstraction thus blurs the distinction *Fischer* drew between entities that receive "benefits" and those that simply get paid. As this Court held there, "[t]he noun 'benefit' means 'something that guards, aids, or promotes well-being.' " *Id.* at 677-678 (quoting Webster's Third New International Dictionary 204 (1971)). Hospitals participating in the Medicare program receive "benefits" because the money they get represents more than just "point-of-sale patient care," *id.* at 678, for it covers not only "medical treatment costs," but also "overhead costs[] and education costs" so that "providers possess the capacity to render, on an

ongoing basis, medical care to the program's qualifying patients." *Id.* at 680. The Medicare program thus "aids" participating hospitals by extending funds that go above and beyond the basic costs of the services they provide. *See id.* at 681 ("Medicare funds * * * provide benefits extending beyond isolated, point-of-sale treatment transactions.").

Not so with entities that enter into garden-variety service contracts with state and local governments. The First Circuit's rule—that an organization receives "federal benefits" whenever it is reimbursed with federal-source funds for services that in some way promote the federal program's goals—cannot be reconciled with the narrow definition of "benefits" this Court adopted in *Fischer*. Under *Fischer*, it is not enough to simply ask whether the federal government hoped that its grant money would be used to hire subcontractors that would advance the program's mission. The proper question, instead, is whether the federal government backed up that aspiration by providing the organization with additional "aid." A typical subcontractor—like ACHS in this case and unlike the hospitals in *Fischer*—receives no additional payment above and beyond the market value of its services. That is to say, it gets paid, not aid. Indeed, from the contractor's perspective, it makes no difference—financially or otherwise—that the money with which it is reimbursed originated with Uncle Sam or someone's Aunt Sally; in either situation, the contractor receives no extra "benefit."

2. The First Circuit's boundless construction of the phrase "recipient" of federal "benefits * * * under a Federal program involving * * * [a] form of Federal assistance" also conflicts with this Court's decisions in *Paralyzed Veterans*, 477 U.S. at 603-612, and *NCAA* v. *Smith*, 525 U.S. at 465-469. The question in *Paralyzed Veterans* was whether Section 504 of the Rehabilitation Act—which prohibits discrimination against handicapped persons in any program or activity "receiving Federal financial assistance," 29 U.S.C.

§ 794—applies to commercial airlines. Although airlines do not receive federal aid, airport operators do. *Id.* at 604-605. In arguing that Section 504 covers airlines, the plaintiffs in *Paralyzed Veterans* reasoned that "airlines are 'indirect recipients' of the aid to airports," because "airport operators convert the [aid] into runways and give the federal assistance—now in the form of a runway—to the airlines." *Id.* at 606. This Court disagreed, holding that Section 504 "draws the line of federal regulatory coverage between the recipient and the beneficiary," *id.* at 610, and that therefore a statue directed toward organizations "receiving Federal financial assistance," 29 U.S.C. § 794, is necessarily limited to "those who receive the aid, but does *not* extend as far as" entities that merely derive some economic advantage from it. *Paralyzed Veterans*, 477 U.S. at 607 (emphasis added).

The Court reaffirmed this rule in *NCAA*. There the question was whether Title IX—which prohibits discrimination on the basis of sex by any educational institution "receiving Federal financial assistance," 20 U.S.C. § 1681(a)—covered the National Collegiate Athletic Association. Although the NCAA is a private association that does not itself receive federal financial assistance, the lower court held that the association was covered because it receives dues from its member institutions, which *do* receive federal assistance. This Court reversed. To apply Title IX to all who realized some gain from federal assistance, this Court held, would—as *Paralyzed Veterans* recognized—"yield almost 'limitless coverage.' " *NCAA*, 525 U.S. at 467 (quoting *Paralyzed Veterans*, 477 U.S. at 608). Because Congress never intended such a result, this Court reiterated that "[e]ntities that receive federal assistance * * * are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not." *Id.* at 468.

The "proposition that federal coverage follows the aid past the recipient" to organizations that merely derive economic advantage from it, *Paralyzed Veterans*, 477 U.S. at 607—

flatly rejected by this Court in *Paralyzed Veterans* and again in *NCAA*—is precisely the principle the First Circuit adopted and applied in this case to extend § 666 to ACHS. Like the NCAA in its case and the airlines in *Paralyzed Veterans*, ACHS did not itself receive federal monies, and—at most—profited only indirectly by the NIDA grant. To be sure, the subcontract ACHS received from the Municipality might never have come into existence had the federal government not disbursed money to the Commonwealth, and had the Commonwealth not passed some of that money on to the Municipality. But the money ACHS received as a result of that arrangement does not make it a recipient of federal benefits; at most, ACHS is simply an indirect beneficiary of federal largesse, wholly beyond the scope of § 666(b). Indeed, this Court has "recognized that most federal assistance has 'economic ripple effects,' " but has emphatically "rejected the argument that those indirect economic benefits can trigger statutory coverage." *Paralyzed Veterans*, 477 U.S. at 607 (quoting *Grove City College* v. *Bell*, 465 U.S. 555, 572 (1984)).

The First Circuit's unprecedented assumption that every entity paid with money originating in a federal grant is necessarily a recipient of federal benefits also conflicts with the rule in *Paralyzed Veterans* that, to determine recipient status, the court must "look to the terms of the underlying grant statute." 477 U.S. at 604. *See also Grove City College*, 465 U.S. at 565. Here, the relevant statute plainly does *not* permit the Secretary of Health and Human Services to make NIDA grants to for-profit entities, like ACHS. *See* 21 U.S.C. § 1177(a). Rather, all the Secretary is empowered to do is "make grants to * * * individuals and public and private *nonprofit* entities." *Id.* (emphasis added). Thus, as a matter of federal law, ACHS could not have even been a *direct* recipient of the NIDA grant benefits. By relying on its own generalized assumption about what federal agencies "would naturally" intend their grant monies to do, instead of looking

to the scope of the grant statute, the First Circuit fundamentally departed from *Paralyzed Veterans*. Its departure all but ensures that "[t]he statutory 'limitation' on § [666]'s coverage would virtually disappear, a result Congress surely did not intend." *Paralyzed Veterans*, 477 U.S. at 609.

3. *Paralyzed Veterans* and *NCAA* involved civil antidiscrimination statutes, not § 666, but the question of the reach of federal jurisdiction is analytically the same. Both Section 504 in *Paralyzed Veterans* and Title IX in *NCAA* were enacted pursuant to Congress's Spending Clause power. U.S. Const. art. I, § 8, cl. 1. So, too, was § 666. *See Fischer*, 529 U.S. at 689 n.3 (Thomas, J., dissenting). And all three statutes employ nearly identical language in establishing their respective federal-funding triggers. *Compare* 18 U.S.C. § 666(b) (applying to an organization that "receives * * * benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance"), *with* 20 U.S.C. § 1681(a) (covering institutions "receiving Federal financial assistance"), *and* 29 U.S.C. § 794 (same). *See also United States* v. *Rooney*, 986 F.2d 31, 34 (2d Cir. 1993) (Section 666 "expressly equates 'benefits' with 'Federal assistance' "). It therefore comes as no surprise that this Court has used remarkably similar language in cautioning against expansive interpretations of all three statutes. *See Fischer*, 529 U.S. at 681 (rejecting the government's proffered interpretation of the phrase "recipient of federal benefits" because "[t]he statute does not employ this broad, almost limitless use of the term"); *Paralyzed Veterans*, 477 U.S. at 608 (rejecting plaintiffs' proposed interpretation of the phrase "receiving Federal financial assistance" because it would lead to "almost limitless coverage").

This interpretive symmetry makes sense. Indeed, it is difficult to fathom why Congress, having used virtually identical federal-funding triggers in the two statutory regimes, would intend the criminal prohibitions it established

against theft and embezzlement in § 666 to have a dramatically *broader* scope than the civil antidiscrimination statutes at issue in *Paralyzed Veterans* and *NCAA*. That is particularly true given the fact that—as we explain in greater detail below—a " 'change in the sensitive relation between federal and state criminal jurisdiction' " invariably occurs "[w]hen Congress criminalizes conduct already denounced as criminal by the States." *United States* v. *Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *United States* v. *Enmons*, 410 U.S. 396, 411-412 (1973)). Under the First Circuit's rule, ACHS is a recipient of federal benefits for purposes of § 666. But under *Paralyzed Veterans*, ACHS is most certainly *not* a recipient of federal assistance for purposes of the Rehabilitation Act. That discrepancy precipitates an irrational anomaly: a thief who loots ACHS of $5,000 may be prosecuted in federal court, but a disabled patient claiming discrimination would have no federal forum. Congress surely never intended such disparate results from statutory provisions with such similar jurisdictional reach.

4. The result of the First Circuit's unwarranted departure from *Fischer*, *Paralyzed Veterans*, and *NCAA* is thus the very vice this Court sought to avoid in those decisions: endowing the statutory program with "broad, almost limitless" coverage. *Fischer*, 529 U.S. at 681; *accord Paralyzed Veterans*, 477 U.S. at 608. On its face, the First Circuit's logic would extend § 666's criminal reach to practically *any* organization that receives payments from another entity that, in turn, receives federal grant money or other assistance. If a subcontractor like ACHS is deemed a recipient of federal benefits simply because it is assumed that the federal government, in making its grant, "would naturally intend its monies to assist"—and thus "benefit"—all those who end up providing such services, then surely the vendors on whom the subcontractor relies in providing those services would be considered recipients of federal benefits, as well. That is because "insur[ing] care of good quality[] in general commu-

nity facilities" necessarily requires that those who perform the services use quality equipment. Thus if, for example, the subcontract in this case had obligated ACHS to conduct HIV blood tests, the syringe manufacturer paid by ACHS—from funds it had received from the NIDA-Commonwealth-Municipality disbursement chain—should be deemed a recipient of federal benefits, since the federal government surely would not want ACHS using defective syringes. And if the syringe manufacturer then paid its plastics supplier with the funds it received from ACHS, then that entity, too, would fall within the scope of § 666. And so on and so on. Under the First Circuit's "for want of a nail" reasoning, every act of theft, embezzlement, or fraud involving any of these "recipients" would become a federal criminal offense, even though Congress plainly never intended such a result.

B. The Federal Courts Of Appeals Are Divided Over The Extent To Which § 666 May Federalize Otherwise Local Crimes Of Theft And Embezzlement.

Not surprisingly, by misapplying this Court's precedents, the court below placed itself in conflict with its sister circuits on the question presented. Moreover, by construing § 666 to reach virtually any entity that receives payment from funds originating in federal grant money, the First Circuit's broad ruling exacerbates an already entrenched circuit-split on the broader question of the extent to which § 666 requires proof of a jurisdictional nexus between the federal interest underlying a disbursement of federal funds and the alleged acts of theft. These conflicts provide an additional basis for granting the petition. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

1. The decision below directly conflicts with the Eleventh Circuit's decision in *United States* v. *Copeland*, 143

F.3d 1439 (11th Cir. 1998). There, the court rejected the government's argument that a defense contractor is an organization that receives federal benefits. Examining the plain language of the statute, the Eleventh Circuit concluded that "[t]he scope of § 666 * * * is not limitless; the statute clearly indicates that only those contractual relationships constituting some form of 'Federal assistance' fall within the scope of the statute." *Id.* at 1441. The court confirmed this circumscribed view of § 666 by resorting to the legislative history:

> [T]he concept [of receiving federal benefits] is not unlimited. The term "Federal program" means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal contract or disbursement of funds would be covered. [*Id.* at 1441-42 (quoting S. REP. NO. 98-225, at 370).]

The Eleventh Circuit therefore ruled, in direct conflict with the First Circuit's decision below, that "organizations engaged in purely commercial transactions with the federal government are not subject to § 666." *Id.* at 1441.

The First Circuit's decision also conflicts with *United States* v. *Wyncoop*, 11 F.3d 119 (9th Cir. 1993). The defendant in *Wyncoop* was convicted under § 666 of embezzling from a university that did not itself receive federal money but nonetheless "benefit[ed] indirectly from the added pool of students who otherwise would not be able to afford the education," but for federal assistance the students received in the form of grants and guaranteed loans. *Id.* at 121. The Ninth Circuit reversed, ruling that the university was not a recipient of federal benefits, since "Congress did not intend * * * to make misappropriations of money from every organization that receives *indirect* benefits from a federal program a federal crime." *Id.* (emphasis in original). Con-

trary to the pervasive role the court below envisioned for federal prosecutors, the Ninth Circuit found "no indication in the history of section 666 that Congress intended federal law enforcement agencies to police the financial affairs of private entities that do not administer federal funds." *Id.* at 122.

It also comes as no surprise that the expansive view of recipient status adopted by the First Circuit conflicts with decisions of other federal appeals courts that have faithfully applied *Paralyzed Veterans*. *See, e.g.*, *Grzan* v. *Charter Hosp.*, 104 F.3d 116, 119-120 (7th Cir. 1997); *Gallagher* v. *Croghan Colonial Bank*, 89 F.3d 275, 277-278 (6th Cir. 1996). In *Gallagher*, the Sixth Circuit held that a bank was not covered by Section 504 of the Rehabilitation Act simply because it made student loans that were subsidized and guaranteed by the federal government. Articulating a rule directly at odds with the approach taken by the court below, the Sixth Circuit explained that federal jurisdiction "does not follow federal aid past the intended recipient to those who merely derive a benefit from the aid *or receive compensation for services rendered pursuant to a contractual arrangement.*" *Id.* at 278 (emphasis added) (quotation omitted).

Likewise, the Seventh Circuit in *Grzan* held that Section 504 of the Rehabilitation Act does not cover employees of a recipient of federal aid, even though they receive payments—in the form of wages—from a federal funding recipient. Based on *Paralyzed Veterans*, the court concluded that simply "benefiting from a federally financed program, even where the benefits are financial, does not necessarily constitute the receipt of federal funding." 104 F.3d at 120.

2. By dramatically expanding the types of organizations covered by § 666, the First Circuit's decision opens the door to countless federal prosecutions—based on the most attenuated of federal connections—for what have traditionally been local crimes of theft, embezzlement, and fraud. That sprawling view of federal criminal jurisdiction contributes to an

ever-widening division among the federal courts of appeals on the broader question whether § 666 prosecutions violate the Spending Clause in the absence of a sufficient nexus between the allegedly corrupt transaction and the federal interest underlying the expenditure of funds.[6]

The Second and Third Circuits have held that such a nexus is a jurisdictional prerequisite under the Spending Clause, lest the general police power of the States be displaced by federal criminal law. *See United States* v. *Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999); *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999).[7] In *Santopietro*, the Second Circuit held that § 666 "requires at least some connection between the [fraudulent conduct] and a risk to the integrity of the federal funded program." 166 F.3d at 93. Thus, the court explained, § 666 could not be used to prosecute a "bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of $10,000." *Id.* The Third Circuit adopted the same view as the Second, reasoning that "[t]he goal [of § 666] was to overcome impediments to reaching actions in which there was a federal interest, not to federalize crimes in which a federal interest was lacking." *Zwick*, 199 F.3d at 684.

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[6] The confusion is due in part to the question this Court left open in *Salinas* v. *United States*, 522 U.S. 52, 59 (1997), in which it noted that "[w]e need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case * * * t[he] relationship is close enough to satisfy whatever connection the statute might require."

[7] Justices Scalia and Thomas have indicated that, for § 666 prosecutions, such a nexus, "or some similar jurisdictional provision, is constitutionally required" because, under the Spending Clause, "the exercise of federal power [must] be related 'to the federal interest in particular national projects or programs.' " *Fischer*, 529 U.S. at 689 n.3 (Thomas, J., dissenting) (quoting *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987)).

The Sixth and Seventh Circuits, on the other hand, have read § 666 to impose no obligation on the government to demonstrate a federal interest in the charged conduct. *See United States* v. *Fernandez*, 282 F.3d 500 (7th Cir. 2002), *pet. for cert. filed*, 71 U.S.L.W. 3138 (Aug. 2, 2002) (No. 02-209); *United States* v. *Suarez*, 263 F.3d 468 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1547 (2002). In *Fernandez*, the Seventh Circuit reaffirmed its rule that no nexus is needed, since "money is fungible and its effect transcends program boundaries." 282 F.3d at 511 (quoting *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.), *cert. denied*, 525 U.S. 879 (1998)). So long as the defrauded organization received more than $10,000 in federal benefits, the government is under no duty to "further establish a link between the defendants' fraud and a federal interest." *Id.* And in *Suarez*, a divided panel of the Sixth Circuit reached the same conclusion, 263 F.3d at 489-490, rejecting Judge Boggs's objection in dissent that, after this Court's decision in *Fischer*, "it is no longer tenable to hold to the proposition that no connection whatsoever need exist between the federally punished criminal conduct and the federal interest in the programs supported by the funds used to satisfy § 666(b)." *Id.* at 486-487 (Boggs, J., dissenting).[8]

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[8] Underscoring the confusion and conflict over § 666's scope, inconsistent decisions from the Fifth Circuit have generated an apparent intra-circuit split. *Compare United States* v. *Reyes*, 239 F.3d 722, 735 (5th Cir.) (rejecting argument that § 666 requires the government to "tie the federal monies to the specific project involved in the illegal activity"), *cert. denied*, 122 S. Ct. 156 (2001), *with United States* v. *Phillips*, 219 F.3d 404, 413-414 (5th Cir. 2000) ("there must be some nexus between the criminal conduct and the agency receiving federal assistance") (quotation omitted). Most recently, a panel of the Fifth Circuit issued three separate opinions on the issue, none of which commanded a majority. *See United States* v. *Lipscomb*, 299 F.3d 303, 305 (5th Cir. 2002). Judge Smith argued that a federal nexus is constitutionally essential, *id.* at 374-377, Judge Wiener argued it is not, *id.*

The decision below exacerbates this split in the circuits. Like the Sixth and Seventh Circuits, the First Circuit's rule legitimates countless federal prosecutions with only the slightest—if any—showing of an actual federal interest in the charged conduct. In this case, the NIDA grant was awarded to address problems of drug addiction, not to police the relationship between closely-held corporations and their shareholder-directors. That grant, moreover, wound its way through several different intermediaries before a fraction of it was finally paid to ACHS as reimbursement for subcontract services rendered. Certainly there is a federal interest in ensuring that the federal funds are used for the purposes intended, but that interest cannot meaningfully be said to carry beyond a grant recipient (or, here, sub-recipient) to what happens to money after it has been paid to a contractor for services rendered. There is no more of a federal interest in prosecuting Dr. Garib for adding his housekeeper to the ACHS payroll than there is in punishing someone for "brib[ing] * * * a city's meat inspector * * * just because the city's parks department had received a federal grant of $10,000." *Santopietro*, 166 F.3d at 93.

The First Circuit's rule thus does exactly what the Third Circuit in *Zwick* criticized as the most "troubling" consequence of interpreting § 666 not to require a federal connection to the charged conduct: "it broadens the range of activity criminalized by the statute and alters the existing balance of federal and state powers by encompassing acts already addressed under state law in which the federal government may have little interest." 199 F.3d at 682-683. Certiorari is warranted to resolve this conflict over the limits of the federal government's authority to criminalize conduct pursuant to the Spending Clause.

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at 311-316, and Judge Duhe refused to reach the issue on procedural grounds, *id.* at 349-360.

C. The Question Presented Is Important And Recurring And Should Be Decided By This Court.

The multiple conflicts presented by this petition provide a compelling basis for plenary review, but the need for certiorari is heightened still further by the important and recurring nature of question presented: whether a private organization that does not itself receive benefits under a federal program is nonetheless covered by § 666 because it receives payments from an entity that does. That question is exceptionally important because, as this Court recognized in *Fischer*, promiscuous application of § 666 would "turn almost every act of fraud or bribery into a federal offense, [thereby] upsetting the proper federal balance." 529 U.S. at 681. And that balance is never more delicate than when federal law threatens to displace state criminal law:

> Under our federal system, the States possess primary authority for defining and enforcing the criminal law. * * * When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction. [*United States* v. *Lopez*, 514 U.S. at 561 n.3 (quotations omitted).]

See also Screws v. *United States*, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.").

The First Circuit's boundless interpretation of § 666's recipient-of-federal-benefits "limitation" improperly skews that balance. Congress never intended § 666 to operate as a general anti-corruption statute encompassing every act of theft against every entity paid with funds originating in a federal disbursement. To the contrary, Congress enacted

§ 666 in 1984 to shore up then-existing federal statutes aimed at protecting federal funds. *See generally* Brown, *supra*, at 247-249. Before then, the federal government could not prosecute the theft of money disbursed under federal grants if title to the funds had either passed to another entity or had become so commingled with other assets that the "Federal character" of the funds could not be shown. S. REP. NO. 98-225, at 369-370. Thus § 666 was enacted to fill gaps in the prosecution of "significant acts of theft, fraud, and bribery *involving Federal monies*." *Id.* at 369 (emphasis added).

The First Circuit's interpretation of § 666, however, legitimates an entire species of prosecutions that goes well beyond anything Congress envisioned. The court's decision easily converts into federal crimes countless cases of relatively petty theft from organizations boasting only the most attenuated connection to the federal government. By ruling that an organization becomes a "recipient" of federal "benefits" anytime it contracts to provide a service that relates in some way to a distant federal grant—and is then paid with funds originating somewhere down a chain of connections in that grant—the Court of Appeals threatens to extend the reach of § 666 beyond any logical stopping point.

That is particularly worrisome because, even before the First Circuit's decision in this case, prosecutions under § 666 had been growing exponentially. From its enactment in 1984 to 1990, the statute generated only 16 reported cases. *See* Brown, *supra*, at 249 & n.11. But from 1991 to 1996, reported prosecutions—which represent just a handful of actual prosecutions—leaped to more than 60. *Id.* And there is little reason to believe the federal government has shied away from § 666 prosecutions. Indeed, the significant volume of federal appellate decisions during the last few years addressing the statute's troubling scope is compelling evidence of the recurring and important nature of the question presented by this case.

II. The Court Should Grant The Petition To Decide Whether, In Puerto Rico, Systematically Excluding Potential Jurors Based On Their Lack Of English Proficiency Violates The Sixth Amendment.

In *Taylor* v. *Louisiana*, 419 U.S. at 528, this Court held that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." In the federal courts of Puerto Rico, however, that constitutional guarantee is illusory. That is because federal law provides that a person otherwise qualified to sit on a petit jury nonetheless "shall" be excluded if he or she "is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form." 28 U.S.C. § 1865(b)(2); *see id.* § 1865(b)(3) (juror must be excluded if "unable to speak the English language"). Whatever its merits elsewhere, in Puerto Rico this policy systematically excludes, as the evidence before the District Court demonstrated, a *majority* of the jury-eligible population—and an even greater percentage of the poor.

The English-proficiency exclusion, as applied to criminal trials in Puerto Rico, cannot be reconciled with this Court's decisions. Under the regime invalidated in *Taylor*, women could not serve on juries unless they filed declarations indicating their willingness to do so. As a result, although 53% of the eligible jury pool were women, less then 1% of those called to serve were. Striking down that system on Sixth Amendment grounds, this Court held that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor*, 419 U.S. at 538.

In *Duren* v. *Missouri*, 439 U.S. 357 (1979), this Court reaffirmed *Taylor* and, in doing so, articulated a three-prong

test for determining whether a given policy unconstitutionally deprives a criminal defendant of a representative jury:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Id.* at 364.]

The First Circuit's decision upholding the federal English-proficiency exclusion clearly conflicts with this formula.

As for the first prong, it is beyond dispute that, in Puerto Rico, Spanish speakers "are sufficiently numerous and distinct from" English speakers so that "if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied." *Id.* (quoting *Taylor*, 419 U.S. at 531). As the evidence presented below indicated, exclusively Spanish speakers constitute a *majority* of the Puerto Rican population. And there is no doubt that they are sufficiently "distinct" from their English-speaking counterparts.

Nor can there be any question that the current levels of representation of exclusive Spanish speakers "in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community." After all, they have *no* representation. This despite the fact that Spanish is, along with English, an official language of the Commonwealth. *See Igartua de la Rosa* v. *United States*, 107 F. Supp. 2d 140, 146 (D.P.R. 2000). To exclude wholesale a majority of the Puerto Rican population from criminal juries is anything but fair and reasonable.

Finally, the English-proficiency policy clearly establishes a systematic exclusion. The systems this Court struck down in

Taylor and *Duren* at least made it possible for the excluded constituency to opt in and be selected for a jury. Those who lack English proficiency in Puerto Rico do not have even that. The policy is absolute and the exclusion is necessarily systematic.

In upholding the exclusionary policy below, the First Circuit relied on its prior precedents finding "that it is 'the overwhelming national interest served by the use of English in a United States court,' which 'justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language.' " App. 26a (quoting *United States* v. *Flores-Rivera*, 56 F.3d at 326). Whatever vague "national interest" the English-proficiency policy furthers, it cannot outweigh a defendant's constitutional right to be tried by a jury representing a fair cross-section of the community. In addition, whatever pragmatic considerations might be advanced in favor of the exclusion, experiences involving deaf jurors in the federal courts reveal that simultaneous-translation capabilities render those concerns more imagined than real.

Since the enactment of the Rehabilitation Act and the Americans with Disabilities Act, 42 U.S.C. § 12101, courts have increasingly permitted deaf persons to serve on juries. *See, e.g.*, *Galloway* v. *Superior Court of the District of Columbia*, 816 F. Supp. 12, 20 (D.D.C. 1993); *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 401-402 (W.D. Pa. 1989). Other federal courts, independent of these antidiscrimination statutes, have as well. *See, e.g.*, *United States* v. *Dempsey*, 830 F.2d 1084, 1090 (10th Cir. 1987). And despite claims that doing so would be impractical, the courts have disagreed. As the Tenth Circuit explained, "the use of an interpreter at trial was an acceptable means to accommodate [the juror's] hearing loss," since "[t]he propriety of using interpreters for both deaf defendants and deaf witnesses is well settled." *Id.* at 1088. Indeed, the Federal Rules of Criminal and Civil Procedure, the Federal Rules of Evidence,

and the Judicial Code all recognize the propriety—and usefulness—of providing interpreters for the hearing impaired. *See* FED. R. CRIM. P. 28; FED. R. CIV. P. 43(f); FED. R. EVID. 604; 28 U.S.C. § 1827. Given the success and experience courts have had with providing interpreters for deaf jurors, there is no reasonable objection to providing English-language interpreters for the vast majority of Puerto Ricans who cannot speak the language.[9]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9] Dr. Garib also adopts the arguments made in the petition for certiorari filed by his codefendant below, Luis Dubón Otero.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 00-2029, 00-2030

UNITED STATES,
Appellee,

v.

LUIS E. DUBON-OTERO,
Defendant-Appellant.

UNITED STATES,
Appellee,

v.

JORGE L. GARIB-BAZAIN,
Defendant-Appellant.

Heard July 31, 2001
Decided May 29, 2002

Before SELYA, Circuit Judge, JOHN R. GIBSON,* Senior Circuit Judge, and LIPEZ, Circuit Judge.

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* Of the Eighth Circuit, sitting by designation.

OPINION

JOHN R. GIBSON, Senior Circuit Judge.

Luis Dubón-Otero and Jorge L. Garib-Bazain appeal from their convictions, after a joint trial, for conspiring to steal property worth more than $5,000 from an organization receiving more than $10,000 in federal benefits in any one-year period. *See* 18 U.S.C. §§ 371, 666(a)(1)(A) and (2) (1994). They argue that there was a constructive amendment of the indictment, that there was insufficient evidence to convict them, and that the jury instructions were defective. They also challenge the makeup of their jury and the appointment of the United States Attorney. Garib also appeals his conviction for making false declarations before a grand jury in violation of 18 U.S.C. § 1623 (1994). We affirm.

Advanced Community Health Services (Health Services) was incorporated in the Commonwealth of Puerto Rico in 1987 as a for-profit corporation.[1] Dubón, a lawyer, and Garib, a doctor, were shareholders and directors. Dubón served as legal advisor to Health Services and Garib as the Medical Director of Patient Services. Dr. Yamil Kouri-Perez was a consultant from the Harvard Institute for International Development who, together with Jeanette Sotomayor-Vazquez, the administrative director, and Angel Luis Corcino-Mauras, the comptroller, conducted the day-to-day operations of Health Services.

Dubón and Garib were charged with conspiring to use Health Services funds to pay personal expenses and make political payoffs. The principal witness at trial was Corcino, whose testimony painted a picture of Kouri as the primary conspirator. Kouri and Sotomayor were indicted along with Dubón and Garib, but tried separately. They were convicted, and we affirmed in *United States v. Sotomayor-Vazquez,* 249 F.3d 1 (1st Cir.2001).

In January 1988, Health Services contracted with the Municipality of San Juan to provide services for AIDS patients.

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[1] Health Services later became a non-profit corporation.

The initial contract provided that the Municipality would pay Health Services a flat fee of $3.2 million per year for these services. Because under the contract Health Services became "the exclusive source of AIDS counseling and professional services in San Juan," *United States v. Dubón-Otero,* No. 97-091, slip op. at 10 (D.P.R. March 3, 2000), federal monies began to find their way to Health Services.

The Government introduced evidence regarding the payment of these federal monies to Health Services, and the ways in which Dubón and Garib diverted these funds. This evidence will be discussed in greater detail below, as we discuss the various arguments made by Dubón and Garib on appeal.

I.

Dubón and Garib argue that the district court erred by allowing a constructive amendment of the indictment. Specifically, they complain the court admitted evidence that the funds the defendants had stolen were federal or public funds, which may have been entrusted to Health Services but never lost their federal or public character. Appellants argue admission of this evidence constituted a constructive amendment of the indictment. They construe the indictment as limiting the charge against them to conspiring to steal only Health Services funds.

> A constructive amendment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them. An amendment of the indictment is considered prejudicial per se and grounds for reversal of a conviction whether it is brought about by a literal alteration of the words of the indictment, a jury instruction which modifies the offense charged in the indictment, or the admission of evidence of an offense not charged by the grand jury.

United States v. Dunn, 758 F.2d 30, 35 (1st Cir. 1985) (internal quotation marks and citations omitted).[2]

The charging paragraph of the indictment alleged that Dubón and Garib, "as agents of an organization which received benefits in excess of $10,000.00 under a Federal program involving a grant, or other form of Federal assistance," conspired with others to "embezzle, steal, and obtain by fraud, and without authority knowingly convert to the use of a person not the rightful owner, and intentionally misapply property worth at least $5,000.00 owned by such organization, that is, monies in excess of $2,000,000.00 in *program funds.*" (Emphasis added.) (Paragraph Thirty-Seven of the indictment read: "the defendants embezzled, stole and obtained by fraud, in excess of $2,000,000.00 of *public funds*." (Emphasis added.)) The indictment incorporated Counts Two through Thirty-Four as overt acts, which further described the funds in question as "owned by or *under the care, custody, and control* of [Health Services]." (Emphasis added.). Under Count I, the indictment charged Dubón and Garib generally with conspiracy to violate § 666. Section 666 seeks, among other things, to punish any agent of an organization receiving more than $10,000 in federal benefits in any one-year period, who "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies property that—(i) is valued at $5,000 or more, and (ii) is owned by, *or is under the care, custody, or control* of such organization." 18 U.S.C. § 666(a)(1)(A) (emphasis added).[3] While the elements of the charged crime

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[2] Because our ultimate conclusion is that there was no constructive amendment in this case, we need not address the Government's argument that the rule of per se reversal of cases where there has been a constructive amendment has been modified by the Supreme Court's recent decision in *Neder v. United States*, 527 U.S. 1 (1999) (holding that failure to instruct jury on element of crime is subject to harmless error review).

[3] The statute provides in relevant part:

(a) Whoever, if the circumstances described in subsection (b) of this section exists—

have to "appear primarily from the language in the indictment . . . common sense suggests that such a citation should not be entirely ignored where, as here, it so plainly reinforces what is implicit in the text." *United States v. McLennan,* 672 F.2d 239, 243-44 (1st Cir. 1982).

Dubón and Garib cite *United States v. Pheaster,* 544 F.2d 353 (9th Cir. 1976), for the proposition that overt acts cannot supply an element missing from the charging paragraph. *See*

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(1) being an agent of an organization, or of a State, local, or Indian tribal government, or agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency;

. . .

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

. . .

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. § 666.

id. at 361 ("[A] conspiracy indictment's specification of overt acts cannot be used to supply the allegation of a critical element completely missing from the charging language."). However, *Pheaster* itself recognized that "reference to the overt acts is appropriate to confirm an otherwise common-sense interpretation of an allegation which is included in the charging language," *id.* at 362, and thus is of no help to Appellants.

A primary objective of the rule against constructive amendment of indictments is to ensure defendants have notice of the charges they must defend against. *United States v. Kelly*, 722 F.2d 873, 876 (1st Cir. 1983); *cf. United States v. Delano*, 55 F.3d 720, 729 (2d Cir. 1995) ("[W]e have consistently permitted significant flexibility in proof, provided that the defendant was given notice . . . ."). The indictment here put Appellants on notice that they would have to defend against exactly the type of evidence of entrustment of which they now complain. If Dubón and Garib chose not to defend against that type of evidence, that choice does not make the district court's permitting the Government to go forward with such evidence a constructive amendment.

II.

The indictment in this case charged a conspiracy covering the years 1989 to 1994. Dubón and Garib argue the district court erred by refusing to acquit them following trial because the Government failed to prove Health Services received any federal benefits before 1991. They contend that amounts received in 1989 were commercial payments, not federal benefits, and thus their convictions could not be predicated on pre-1991 conduct.[4] Since there would be no way of assuring the jury did not rely on pre-1991 conduct in reaching its conclusion, the conviction could then not stand. *See Yates v. United States*, 354 U.S. 298, 312 (1957) ("[W]e think the proper rule to be applied is that which requires a

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[4] As we explain below, federal monies are not synonymous with federal benefits for purposes of a conviction under § 666.

verdict to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected."). The Government, on the other hand, argues it proved Health Services received federal benefits beginning in January 1989. In the alternative, the Government argues the Supreme Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), modified *Yates* to allow harmless error review, and the error here was indeed harmless.[5]

We review a denial of a Rule 29 motion for acquittal de novo. *United States v. Czubinski*, 106 F.3d 1069, 1073 (1st Cir. 1997). We also review de novo the question of what type of transactions constitute benefits under § 666. *See United States v. Peery*, 977 F.2d 1230, 1233 n. 2 (8th Cir. 1992) ("[D]etermining whether section 666 applies to Peery's conduct is a question of law."). Finally, we review de novo the question of whether the Government presented sufficient evidence at trial to prove Health Services in fact received benefits under § 666, viewing the evidence in the light most favorable to the Government. *See United States v. Otero-Mendez*, 273 F.3d 46, 50 (1st Cir. 2001); *United States v. Fischer*, 168 F.3d 1273, 1276 n. 7 (11th Cir. 1999), *aff'd Fischer v. United States*, 529 U.S. 667 (2000); *United States v. Copeland*, 143 F.3d 1439, 1442 (11th Cir. 1998).

Appellants concede Health Services received federal benefits beginning in 1991. The question we must answer is whether Health Services' receipt of federal monies between 1989 and 1991 constituted receipt of federal benefits. Three distinct transactions are at issue. First, on January 13, 1989, Health Services deposited two checks totaling $11,862.14 from the Centers for Disease Control, a federal agency. The Centers for Disease Control had contracted with the Municipality to test members of the public for AIDS, and the Municipality subcontracted the work to Health Services. Health Services was paid directly by the Centers for Disease Control. There was evidence Health Services received

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[5] As in Part I above, our ultimate conclusion here precludes our having to address the Government's alternative *Neder* argument.

another $11,124.03 from the Centers for Disease Control in August 1989 for similar work. Second, Health Services received $70,680 in 1989, and $99,729 in 1990, to operate an assessment and intervention center for drug addicts. This money came from the Municipality. The Municipality in turn had received it from the Commonwealth, which had received it as a grant from the National Institute on Drug Abuse (the Institute), a federal agency. Third, on January 10, 1989, Health Services received $100,000 for work on a mass-media education project on AIDS. Although this money was paid by the Municipality, there was testimony from a municipal official that this payment had its source in federal funds, which passed through the Puerto Rico Department of Health to the Municipality.

The Supreme Court recently addressed the issue of what constitutes receipt of benefits under § 666 in *Fischer v. United States*, 529 U.S. 667 (2000).[6] In that case, the Court concluded that § 666 "covers fraud perpetrated on organizations participating in the Medicare program." *Id.* at 669. The Court reached this conclusion because the "nature and purposes of the Medicare program," *id.* at 671, indicated payments were made "for significant and substantial reasons in addition to compensation or reimbursement," such as assisting "the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community," *id.* at 679-80. The Court stated that the term "benefits" is used in the statute in its ordinary sense, *id.* at 677, and since the hospitals themselves derive significant advantage from participating in Medicare, they could be said to be deriving benefits within the meaning of § 666, "a statute we have described as 'expansive,' 'both as to the [conduct] forbidden and the activities covered,' " *id.* at 678

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[6] *Fischer* was decided after the convictions in this case. Nonetheless, it applies on direct appeal. *See United States v. Ochs*, 842 F.2d 515, 519 (1st Cir. 1988) ("[I]n our direct review of the convictions entered below, we are bound by *McNally* [v. *United States*, 483 U.S. 350 (1987)], even though it was decided after the completion of proceedings in the district court.").

(quoting *Salinas v. United States*, 522 U.S. 52, 56 (1997)). The Court saw this conclusion as consistent with the language of the statute, which "indicates that Congress viewed many federal assistance programs as providing benefits to participating organizations," as well as "Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs." *Id.* at 678. The Court set out the following test:

> To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program.

Id. at 681.

The Court rejected the notion that Medicare payments made to the hospitals were compensation of the type excluded by § 666(c).[7] In addition to the fact that monies paid included sums to enhance the hospitals themselves, Medicare placed conditions on recipient hospitals, "unlike the case of a contractor whom the Government does not regulate or assist for long-term objectives or for significant purposes beyond performance of an immediate transaction." *Id.* at 680.[8] The Court also rejected the contention

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[7] Subsection (c) states: "This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business."

[8] A number of cases from other circuits, which preceded *Fischer*, also support the proposition that, while purely commercial payments made by the government "as a commercial entity, such as payments for supplies or equipment," do not constitute benefits under § 666, the mere presence of quid pro quo does not preclude a finding of federal benefits. *United States v. Rooney*, 986 F.2d 31, 33-34 (2d Cir. 1993) (holding that loan proceeds received from the Farmers Home Administration constituted benefits); *see United States v. Copeland*, 143 F.3d

that since the primary beneficiary of Medicare was the individual patient, the hospitals could not also be said to have received a benefit under the program. *Id.* at 677. Finally, the Court refused to endorse the notion that all that was required for funds to constitute benefits under § 666 was to establish that they came from a federal program. *Id.*

When we apply *Fischer* to this case, we conclude, and the jury supportably could have so found, that the Institute payments that Health Services received constituted benefits.[9] The Institute[10] monies in this case were originally disbursed under a grant to the Puerto Rico Department of Anti-Addiction Services. Anti-Addiction Services in turn made a grant of a portion of these funds to the Municipality, which then paid Health Services. Dubón acknowledges this

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1439, 1441 (11th Cir. 1998) (holding that money paid to Lockheed Aeronautical Systems Company as the prime contractor for the Department of Defense did not constitute benefits under § 666); *United States v. Marmolejo*, 89 F.3d 1185, 1189-91 (5th Cir. 1996) (holding that funds provided to a county jail, in exchange for the jail housing federal prisoners, constituted benefits), *aff'd sub nom. Salinas v. United States*, 522 U.S. 52 (1997). Those cases distinguish purely commercial transactions from "monies distributed through 'Federal programs,' for which there is 'a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives.' " *Rooney*, 986 F.2d at 35 (quoting S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510); *see Copeland*, 143 F.3d at 1441-42; *Marmolejo*, 89 F.3d at 1190.

[9] We thus need not decide the character of the Centers for Disease Control or mass-media education project payments.

[10] The National Institute on Drug Abuse "supports over 85 percent of the world's research on the health aspects of drug abuse and addiction." National Institute on Drug Abuse, *Welcome to the NIDA Website, at http: //www.drugabuse.gov/NIDAWelcome.html* (last visited May 17, 2002). Part of its mission "is to ensure the rapid and effective dissemination and use of the results of that research to significantly improve drug abuse and addiction prevention, treatment, and policy." *Id.* Distribution of funds is authorized under 21 U.S.C. § 1177 (1994).

money was "clearly a grant intended to assist AIDS patients in Puerto Rico," and "may also have been intended to assist the Commonwealth or the Municipality in that it enabled these government entities to assist citizens with drug addictions." Dubón questions, however, "whether the program under which this money was paid was intended to aid or promote the well being of [*Health Services*]." We point out that the Supreme Court in *Fischer* only said that "[t]he answer [to the question of whether there are federal benefits under § 666] *could* depend . . . on whether the recipient's own operations are one of the reasons for maintaining the program . . . . Other cases may present questions requiring further examination and elaboration of the term 'benefits.' " 529 U.S. at 681-82 (emphasis added).

One of the Institute's goals in making grants is to "insure care of good quality, in general community facilities." 21 U.S.C. § 1177(f).[11] Under its contract with the Municipal-

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[11] Congress has authorized the Secretary of Health and Human Services, "acting through the National Institute on Drug Abuse," to make grants and "enter into contracts with individuals and public and private nonprofit entities" in order to provide "educational programs, technical assistance for the development, demonstration, and evaluation of drug abuse prevention, treatment, and rehabilitation programs," and in so doing to "accord a high priority to applications for grants or contracts for primary prevention programs." 21 U.S.C. § 1177(a). The Secretary is to "require coordination of all applications for programs." § 1177(c). Projects and programs for prevention and treatment services are subject to specific requirements. They should, "whenever possible, be community based, insure care of good quality in general community care facilities . . . and be integrated with, and provide for the active participation of, a wide range of public and nongovernmental agencies, organizations, institutions, and individuals." § 1177(f). "[W]here a substantial number of the individuals in the population served by the project or program are of limited English-speaking ability[, they should] . . . utilize . . . outreach workers fluent in the language spoken," and "identify an individual who is fluent both in that language and English" to provide guidance to individuals of limited English-speaking ability. *Id.*

ity, Health Services was "the exclusive source of AIDS counseling and professional services in San Juan . . . supplying AIDS services under a federally financed program." *Dubón-Otero,* No. 97-091, slip op. at 10.[12] Therefore, the Institute would naturally intend its monies to assist Health Services in providing AIDS care, much as Medicare monies assist hospitals in providing patient care.

It makes no difference that Health Services received this money indirectly. It is now well established that benefits under § 666 are not limited solely to primary target recipients or beneficiaries. *See Fischer,* 168 F.3d at 1278 ("[T]he plain language of § 666(b) does not distinguish between an organization . . . that receives 'benefits' directly under a federal program and an organization . . . that receives 'benefits' as an assignee under a federal program."); *cf. Fischer*, 529 U.S. at 677-78 ("Medicare operates with a purpose and design above and beyond point-of-sale patient care."). Health Services' contract with the Municipality contemplated a relationship between Health Services and the United States Government, and those operating federal assistance programs like the Institute are well aware that recipients of program funds use subgrants and subcontracts to further effectuate the

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[12] The contract with the Municipality provides in pertinent part that:

> The Municipality must hire the services of a company with personnel that has the experience and professional knowledge necessary to design, establish, direct and manage the AIDS program of San Juan . . . . [Health Services] will utilize the equipment located at the facilities provided by the Municipality . . . . Epidemiological services will be provided in order to establish a state of alertness of the disease as well as counseling and treatment to the patients. The epidemiological activities shall be coordinated with the respective state and federal authorities . . . . [Health Services] will establish an educational program for the community in order to create public conscience especially to high risk groups . . . . The population at large will be educated regarding prevention of AIDS and the different methods of transmission.

program's goals. Lawrence Poole, a grants manager for the United States Department of Health and Human Services,[13] testified that "a grant award [that] is issued by an agency could and does in fact translate into subcontracts or subgrantee relationships with other organizations." Poole further testified that Health Services received federal funding as a subgrantee for the years of 1988 and 1989, and that "the requirements for each subgrantee or subcontract relationship are subject to the same requirements for accountability of federal funds and terms of the award as the actual grantee recipient of federal funds." We conclude that if the payments in *Fischer* were "made not simply to reimburse," 529 U.S. at 679, then neither were the payments here.

III.

Dubón and Garib argue that the district court erred in denying their motions for acquittal for insufficient evidence. Pointing to the fact that the indictment charged them with conspiring to steal from Health Services, they assert the Government did not prove the crucial element of lack of consent of the corporation. They cite *United States v. Burbank* for the proposition that there can be no theft where "[n]o evidence [is] presented by the government to show that the transactions were not authorized by the corporation." 848 F.2d 453, 454 (4th Cir. 1988).[14] They contend Health

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[13] The Department of Health and Human Services encompasses the National Institute on Drug Abuse. Mr. Poole described his duties as administering individual discretionary grant programs geared primarily toward provision of health care in United States territories. He had been with Health and Human Services approximately thirty years and was very familiar with their federal grant programs.

[14] Because we ultimately conclude that there was sufficient evidence for the jury to find a lack of valid authorization, Appellants' *Burbank* argument need not detain us. We have serious concerns about some of the broad language in *Burbank*, but it suffices to say that while it is one thing to decide that the consent of sole or co-owners can preclude conviction for interstate transport of stolen money (as was the case in *Burbank* under 18 U.S.C. § 2314 (2000)), it would be quite another to extend that holding to

Services' shareholders and board of directors consented to the transactions at issue and therefore there was no theft.

In reviewing a challenge to the sufficiency of the evidence, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942); *see United States v. Mena-Robles*, 4 F.3d 1026, 1031 (1st Cir. 1993) (stating that the issue in a sufficiency challenge is "whether the evidence and reasonable inferences therefrom, taken as a whole and in the light most favorable to the prosecution, would allow a rational jury to determine beyond a reasonable doubt that the defendants were guilty as charged").

The Government presented evidence that between 1987 and May 1991 Dubón received $10,000 per month from Health Services as a legal retainer, although Health Services' board of directors had authorized a retainer of only $5,000. Someone had tampered with the original board minutes to show authorization for a monthly retainer of $10,000, allowing Dubón to funnel the additional $5,000 per month to Kouri. Specifically, the director of the word processing center where the minutes were transcribed testified that the original page of the minutes setting forth the retainer as $5,000 was replaced in another set of minutes with a page showing the retainer as $10,000. The page showing the retainer as $10,000 was a different consistency than the rest of the minutes and was not produced at the same word processing center. Corcino testified the additional $5,000 was going to Kouri to pay Kouri's home rent and credit card bills. Corcino further testified that Kouri could not be on Health Services' payroll because Kouri was under contract with the Harvard Institute for International Development, which in turn had a contract directly with the Municipality of San Juan.

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this case involving a conspiracy to embezzle or steal funds from an organization receiving funds from the federal government, especially given the attendant complexities of 18 U.S.C. § 666.

The Government also presented evidence that Garib employed a personal housekeeper, as well as a secretary for his private practice, using Health Services' money. Corcino, Health Services' comptroller, testified that for a long time he was not aware that Health Services was paying for a private secretary and personal housekeeper for Garib, and that in his opinion such payments constituted an unauthorized diversion of Health Services funds for personal use. The housekeeper testified that the signature on the timesheets bearing her name was not hers. The secretary testified that while she was paid by Health Services, ninety-nine percent of her time was spent on tasks related to Garib's private practice.

Finally, there was evidence at trial that Appellants also used Health Services assets to purchase political support, which Health Services was dependent upon for its funding. Before the San Juan mayoral election of 1988, Garib allegedly loaned a $19,000 video camera to one of the candidates, Jose Granados-Navedo. The camera had been purchased with a Health Services check. Garib and Kouri later met with Granados to discuss Health Services providing other financial support for his campaign.

To generate more cash, Garib, Sotomayor, and Corcino then met with Antonio Fernandez, the owner of IMA Productions, and presented him a Health Services check made out to IMA in the amount of $60,000 and signed by Garib and Sotomayor. Only some of this money was intended to pay for services performed by IMA. Garib asked Fernandez to endorse the check and cash it—for else write separate IMA checks payable to other persons who had not rendered services—so Garib could recover the excess in cash. Garib explained Health Services had an urgent need of cash to make certain payments that it could not make by company check. When Fernandez refused to participate, Garib stated that he had solved the problem in another way. Garib later met with Granados and gave him a box containing more than $100,000 in cash.

Granados lost the election. After the new administration assumed office, payments on the AIDS contract were delayed. Kouri later told Corcino that he had taken care of the

problem by arranging for $5,000 a month to be paid to the candidate who had won the election, Mayor Hector Luis Acevedo, and $5,000 to the Director of the Health Department of the Municipality, Dr. Freddie Borras. Regular payments by the Municipality on the AIDS contract then resumed. The $10,000 monthly payments were raised by cashing Health Services checks issued to persons who had performed no services. Several of these checks were signed by Garib and Dubón. Dubón's law firm was also involved in cashing a series of these Health Services checks at Dubón's direction, with at least one of the checks being issued to Dubón's son, who had performed no services. Toward the end of 1990 Dubón told Corcino, "I am not going to sign for that [expletive] any longer." He did not, however, object to the continued diversion of the funds.

Viewing this evidence in the light most favorable to the Government, as we must, we conclude that a rational jury could find beyond a reasonable doubt that Dubón and Garib were participants in a conspiracy to use Health Services funds to pay personal expenses and make political payoffs as charged in the indictment. The evidence of informal alterations of the board minutes as a means to funnel funds to Kouri, of the apparent use of a forged signature to divert Health Services' funds to pay for Garib's personal housekeeper, of the use of a Health Services' employee to do work almost exclusively for Garib's private practice, and of the clandestine efforts to turn Health Services checks into cash are all evidence from which a jury could find that defendants "without valid authority" embezzled, stole, or obtained by fraud money or property.

IV.

Dubón and Garib challenge a number of the district court's decisions regarding jury instructions. We address each in turn, recognizing that when alleged errors involve particular instructions' adequacy in explaining the law, as they do here, "[w]e must look at the entire charge, in light of the evidence, and determine whether, taken as whole, the court's instructions fairly and adequately submitted the issues in the case to

the jury." *United States v. Woodward*, 149 F.3d 46, 69 (1st Cir. 1998).

A.

The district court denied defendants' requested jury instructions, including instructions which required the Government to prove that the actions of defendants were designed to "cheat Health Services," that Health Services was the "victim," and that authorization by Health Services was thus a defense.[15] Instead, the district court instructed the jury that it was sufficient to find that the funds at issue were "something of value in excess of $5,000 in connection with federal funding" and "under the care, custody or control" of Health Services.

We conclude the district court did not err in its instructions to the jury. The district court instructed that theft involved taking property without authority and that embezzlement involved taking property under one's control belonging to another.[16] Its further instructions that there

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[15] One of the requested instructions said that "to act with intent to defraud means to act knowingly with the intent or the purpose to obtain, deceive, or cheat [Health Services] out of money or property." There was also a request to instruct the jury that

> The government must prove beyond a reasonable doubt that [Health Services] did not authorize the expenditure. One of the ways by which a corporation can authorize a payment is by the board of directors. If the board of directors of Advanced Community Health Services authorized an expenditure, then this expenditure was not theft or embezzlement.

Other instructions were requested, but since they all embody variations of the same theme as the ones above, we need not set them all out.

[16] The district court instructed:

> Embezzlement is the fraudulent appropriation of property with [sic] one properly entrusted with its possession.
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> It is to willfully convert to one's own use, without authority, another's money and property, of which the wrongdoer

was a crime if the money or property stolen "was owned by or was under the care, custody, or control of [Health Services]," was proper in light of our discussion above in Part I. The instructions taken as a whole fairly and adequately informed the jury of the applicable law.

B.

Dubón and Garib argue the district court erred by refusing to instruct the jury on the requested definition of federal benefits. We have already set out the applicable law as to what constitutes federal benefits under § 666 in Part II above.

Dubón and Garib requested the following instructions: (1) Not every payment by the federal government to an organization constitutes federal "benefits" as required by the statute; (2) Federal money paid to a private corporation as payment of fees for services already rendered by the corporation does not qualify as federal benefits; (3) Payments made by the federal government to a private corporation as part of an ordinary commercial transaction do not qualify as federal benefits; (4) Money paid to a corporation is a federal benefit if the corporation was required to "administer" the money under an agreement with the government or to "disburse" the money to others. The district court, meanwhile, tracked the statutory language in instructing the jury.[17] *Cf. United States v. Paradies*, 98 F.3d

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acquired possession validly, of [sic] some office, employment or position of trust.

Theft, also known as larceny, is the act of stealing or taking of property without the owner's consent. It is the fraudulent taking of personal property for [sic] money belonging to another from his possession or from the possession of some person holding the same for him without his consent, with an intent to deprive the owner of the value of the same and to appropriate it to the use or benefit of the person taking it.

[17] The district court instructed the jury that in order for them to return a guilty verdict, Health Services must have received

1266, 1289 (11th Cir. 1996) (concluding there was no plain error in district court's failure to instruct on an element of § 666, where the instructions "tracked the statutory requirements" and the evidence at trial was sufficient for a jury to find the element in question satisfied).[18]

We conclude the first three of the requested instructions were adequately covered by the district court when it instructed the jury that "legitimate, valid, bona fide salary, wages, fees, or other compensation paid or expenses paid or reimbursed in the ordinary course of business" did not constitute benefits. As to the fourth requested instruction, Dubón and Garib direct us to no authority supporting such a definition of federal benefits under § 666, nor do we believe that such is a complete statement of the law in this respect.[19]

> in any one-year period benefits in excess of $10,000 under a federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance or other form of federal assistance. This section [666] does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed in the usual course of business.

The district court reiterated this element of § 666 later.

[18] Dubón and Garib cite *Marmolejo*, 89 F.3d at 1189, for the proposition that "[t]he plain language of § 666 is ambiguous in defining 'Federal Program' and 'Federal Assistance,' " and therefore more was required than mere recitation of the statutory language. However, there can be little doubt that the National Institute on Drug Abuse (which we have concluded is the source of the federal benefits at issue here) is a federal assistance program. Thus, even if we were to find error in the district court's failure to define "federal program" and "federal assistance" in its instructions, such error would be harmless. *See Bastien v. Goddard*, 279 F.3d 10, 16 (1st Cir. 2002) (instructional error "entitles appellant to a new trial on his claim only if it had a prejudicial effect").

[19] Garib acknowledges the requested instructions were written "so that the jury could differentiate between the payments Health Services received in 1989 (which were not 'benefits'), and the federal grants it received after February 1991 (which were 'benefits')." Since we have already concluded that Health Services did

We cannot conclude that there is error in refusing an offered instruction where we are left to speculate as to an appellant's legal underpinning for the proposed instruction. One may argue that *United States v. Rooney*, 986 F.2d 31 (2d Cir. 1993), provides some support. In that case the Second Circuit stated that "[i]n each of the cases [enumerated by the Senate Report to illustrate situations § 666 is intended to include], the organization . . . provided the Federal government with a service by administering a government program." *Id.* at 35. But that discussion of legislative history was dictum, since the court there had already concluded that benefits were present on the basis of § 666's statutory language. *Id.* at 34. More importantly, a court's refusal to instruct in the language of an appellate opinion does not justify reversal. *See Kent v. Smith*, 404 F.2d 241, 244 (2d Cir. 1968) ("[I]t is generally not helpful to take quotations from the opinions of appellate courts, that were never intended to be used as instructions to juries, and submit these in the form of requests to charge.").

We are aware that the Supreme Court in *Fischer* stated that "[t]o determine whether an organization participating in a federal assistance program receives 'benefits,' an examination must be undertaken of the program's structure, operation, and purpose." 529 U.S. at 681. The record before us demonstrates that evidence was before the jury relevant to these issues, and the district court, in ruling on the motion for acquittal, expressly analyzed these issues.[20] The district court did not err in instructing the jury in this respect.

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receive benefits in 1989, the requested instructions buckle under their own weight.

[20] The district court stated:

> Defendants' requests are premised upon their enduring contention that federal money paid to a private corporation which performs a service for the government can not constitute federal benefits.
>
> We have disagreed, and continue to disagree, with such a contention. To summarize, we find that [Health Services] was not in a purely commercial relationship with the federal

C.

Dubón and Garib argue that the district court erred by refusing to instruct the jury that it could only return a verdict of guilty on the basis of conduct occurring after Health Services first received federal benefits. The requested instruction stated:

> An expenditure that occurred before [Health Services] ever received any federal benefits is not a violation of 18 U.S.C. section 666. The government must prove that the defendant agreed to an unauthorized expenditure or expenditures that occurred after [Health Services] received federal benefits. Therefore, if the defendant agreed only to an expenditure or expenditures occurring before Health Services received any federal benefits, you must find the defendant not guilty of count 1.

The district court denied this request.

The relevant statutory language states: "[T]he circumstance [that must exist for there to be a federal crime] is that the organization . . . receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." § 666(b). The statute further

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> government. First, the contract between the Municipality of San Juan and [Health Services] provided that [Health Services] was to be the exclusive source of AIDS counseling and professional services in San Juan and that the Municipality maintained administrative and supervisory roles over [Health Services]. This fact alone clearly indicates more than a commercial relationship. Moreover, we find that the contractual relationship itself is a form of a federal assistance, supplying AIDS services under a federally financed program. *See United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) ("[O]rganizations engaged in contractual relationships with the federal government would fall within the scope of [section 666], if those 'contractual relationships constitut[ed] some form of Federal assistance.' ") (internal citations omitted). We instructed the jury accordingly.

Dubón-Otero, No. 97-091, slip op. at 10-11.

defines one-year period as "a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense." § 666(b)(5).

Garib now argues the instruction given by the district court allowed the jury to return a guilty verdict on the basis of conduct occurring before Health Services received any federal money at all, much less federal benefits.[21] For instance, the jury could have found Garib guilty on the basis of conduct occurring only in 1988 (before Health Services received any federal monies), added twelve months to get into 1989 (when Health Services received over $10,000 in federal funds), and thus satisfied the instruction. Garib argues federally criminalizing his 1988 conduct in that way would exceed the government's authority under the Spending Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 1. *See Fischer,* 529 U.S. at 689 (Thomas, J., dissenting) ("We have held that the spending power requires, at least, that the exercise of federal power be related 'to the federal interest in particular national projects or programs.' ") (quoting *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)); *United States v. Zwick*, 199 F.3d 672, 687 (3d Cir. 1999) ("Applying § 666 to offense conduct, absent evidence of any federal interest, would appear to be an unconstitutional exercise of power under the Spending Clause.").

In support of his contention that the jury could have found him guilty based solely on 1988 conduct, Garib points to the Government's argument to the jury in summation:

> And you will recall that Mr. Poole testified that on January 10 of 1989, federal funds were received through that grant. And you will recall that that grant was in excess of

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[21] Because Dubón's conduct all involved 1989, and because we have already concluded that there was indeed sufficient evidence for the jury to find that Health Services had received federal benefits in 1989, we only need to consider this argument as it pertains to Garib.

> $10,000. And why is that date important? Because, as the judge will instruct you on what the law is for federal program fraud, the government has to prove that $10,000 were received in any one calender [sic] year period either before or after the commission of the offense. And if you take the date of January 10th of 1989 and go back one year, it takes you to January 10th of 1988, close to the date on which [Health Services] was created.

Garib and Dubón requested a special verdict that would have required the jury to identify what conduct it was basing its verdict on, but the Government objected, and the district court did not submit a special verdict form.

The Government responds that the indictment charged a conspiracy beginning in 1989 and that the jury was instructed accordingly. It argues the 1988 conduct was only presented to show the existence of a conspiracy. It further argues that even if 1988 conduct was a basis for the jury's verdict, there in fact was federal interest in the form of pending contracts. Finally, the Government argues any error was harmless because the jury found that a conspiracy existed, that Dubón's conduct occurred in 1989, and that Garib, as a co-conspirator, was responsible for that conduct.

We conclude there was no error. To begin with, the instruction requested by Dubón and Garib was not a correct statement of the law, because what the Government had to prove was that the defendants agreed to join a conspiracy to steal from Health Services and that an overt act in furtherance of that conspiracy occurred after § 666 became applicable. The requested language was simply too narrow. Most importantly, however, the district court's instructions as to the scope of the indictment properly limited the jury:

> So let's now talk about conspiracy. For you to find a defendant guilty of conspiracy, you must be convinced that the government has proved each of the following elements beyond a reasonable doubt. First, that between in or about *January of 1989* up to and including February of 1994, the agreement specified in the indictment and not some other agreement or agreements existed between at

> least two of the defendants charged in the indictment; and second, that the defendants Luis Dubón and Jorge Garib each willfully joined in that agreement; and third that at least one of the conspirators committed at least one overt act in the an [sic] effort to further the purpose of the conspiracy.

(Emphasis added.)

As for the Government's argument to the jury in summation, it was not the subject of a timely objection and we will not say it was plain error to permit it.[22] *See Chute v. Sears Roebuck and Co.*, 143 F.3d 629, 630 (1st Cir. 1998) ("[T]he court of appeals will consider a forfeited objection only if an error was committed, if the error was 'plain' (i.e. clear under current law), if the error was prejudicial, and if review is needed to prevent a miscarriage of justice.") (citing *United States v. Olano*, 507 U.S. 725, 733-37 (1993)).

V.

Garib challenges his perjury conviction. *See* 18 U.S.C. § 1623 (imposing punishment on anyone who, under oath in any proceeding before any grand jury, knowingly makes any false material declaration). Garib's perjury charge stems from testimony he gave before the grand jury. As part of that testimony he denied giving political contributions, or loaning a video camera, to Granados. He also denied asking Fernandez to sign a $60,000 check so Garib could generate cash.

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[22] Garib also points to the district court's reimbursement order following the conviction as evidence of the district court's alleged confusion on this issue. In that order, the district court required Garib to repay the federal government for losses it incurred as a result of Garib's conduct in 1988. Even if we were to agree that the reimbursement order suggests a misunderstanding of the law on the part of the judge, it does not invalidate the judge's instructions. The judge need not be correct in his reasoning, so long as he was correct in his decision being challenged on appeal. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.").

Garib now argues he was denied a fair trial on his perjury charge for two reasons. First, he argues that by improperly instructing the jury as to § 666's "one-year-period" and Health Services' authorization defense, the court effectively directed a verdict as to materiality. Because we have concluded above that the district court's instructions on these matters were not improper, Garib's argument on this first point must fail. Second, Garib argues the district court's instructions as to perjury removed the Government's burden of proving the falsity of the statements at issue. The district court instructed the jury that:

> In order to sustain its burden of proof for the purpose of making a false declaration before the federal grand jury as charged in Count Thirty-five of the indictment, the government must prove the following four essential elements beyond a reasonable doubt. One, that the defendant Jorge Garib gave testimony under oath before a federal grand jury; number two, that the defendant Jorge Garib made *the false material statement* as detailed in the indictment during that testimony; three, the defendant Jorge Garib knew that the statements were false when he gave the testimony; and four, that the statement or representation was material, meaning that it had a natural tendency to influence or was capable of influencing a decision or an action, whether or not it actually influenced or deceived anyone. I also instruct you that truth is a defense to perjury.

(Emphasis added.) We see no error in the district court's instructions because they adequately covered the Government's burden of proof. *See United States v. Watson*, 623 F.2d 1198, 1204 (7th Cir. 1980) (upholding similar instruction).[23]

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[23] Garib raises three other arguments, which we conclude are without merit. As phrased in his brief, they are: "The District Court's Flawed Instructions On § 666 Propelled The Prosecutor To Argue That Dr. Garib Had A Motive To Lie To The Grand Jury"; "The District Court's Endorsement Of The Flawed Theory Of Prosecution Invited The Prosecutor To Assail Dr. Garib's Character And Prejudice His Right To A Fair Trial"; "The Cumulative

VI.

Finally, Dubón and Garib challenge the makeup of their jury and the appointment of the interim United States Attorney.

A.

Dubón and Garib argue that their right, as criminal defendants, to a petit jury selected from a fair cross-section of the community, *see Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) ("the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial") (citing also 28 U.S.C. § 1861), is denied in Puerto Rico by the exclusion of potential jurors who are not proficient in English—an exclusion which they allege systematically excludes the poor. We previously held a similar challenge to be unavailing in *United States v. Benmuhar*, 658 F.2d 14 (1st Cir. 1981). Dubón and Garib seek to distinguish *Benmuhar* as having been decided in part upon the absence of any viable alternative, while here they suggested simultaneous translation. However, we stated in *United States v. Flores-Rivera*, that it is "the overwhelming national interest served by the use of English in a United States court," which "justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language." 56 F.3d 319, 326 (1st Cir. 1995) (quoting *United States v. Aponte-Suarez*, 905 F.2d 483, 492 (1st Cir. 1990)). This justification is independent of the presence or lack of any viable alternatives. Accordingly, we reject Appellants' contention.

B.

Dubón and Garib challenge the appointment of interim United States Attorney Guillermo Gil as statutorily and constitutionally defective. As Appellants themselves recognize, this issue has been definitively resolved in the Govern-

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Effect Of The District Court's Errors Deprived Dr. Garib Of A Fair Trial."

ment's favor. *United States v. Hilario*, 218 F.3d 19, 22 (1st Cir. 2000).

VII.

Accordingly, we affirm.

APPENDIX B

[Filed March 3, 2000]

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Criminal No. 97-091 (JAF)

UNITED STATES OF AMERICA,

Plaintiff,

v.

LUIS E. DUBÓN-OTERO (10) and JORGE L. GARIB-BAZAIN (11),

Defendants.

OPINION AND ORDER

On February 11, 2000, a jury convicted Defendants Jorge Garib-Bazaín ("Garib") and Luis Dubón-Otero ("Dubón") for their participation in a conspiracy to embezzle federal program funds through Advanced Community Health Services ("ACHS") pursuant to 18 U.S.C. § 666 (1994). Defendant Garib was also convicted of perjury pursuant to 18 U.S.C. § 1623(a) (1994).

Defendant Garib moves for a judgment of acquittal, arrest of judgment, or a new trial pursuant to Fed. R. Crim. P. 29, 33, and 34. Specifically, Defendant Garib alleges that: (1) we instructed the jury erroneously; (2) we lacked subject matter jurisdiction over the conspiracy charge in the indictment; (3) the indictment failed to state a federal offense; (4) we erroneously admitted evidence in the form of allegedly-altered ACHS Board of Directors' Minutes; (5) we erred in not granting Defendant's pretrial motion for a change of

venue and, thus, the prejudicial publicity prior to and throughout the trial violated his Sixth Amendment rights to an impartial adjudication, U.S. CONST. amend VI; and (6) we should have dismissed his indictment because interim United States Attorney Guillermo Gil's appointment is unconstitutional.

Defendant Dubón moves for a new trial pursuant to Fed. R. Crim. P. 33, due to: (1) our erroneous denial of his motion for change of venue; and (2) overwhelming pretrial publicity. Defendants join the relevant portions of each other's motions.

I.

Legal Standards

A. Federal Rule of Criminal Procedure 29

A motion pursuant to Rule 29 tests the legal sufficiency of the evidence against a defendant. *See Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979). A court must direct acquittal "if the evidence is insufficient to sustain a conviction." FED. R. CRIM. P. 29(a). In ruling on a Rule 29 motion, the court "must take the evidence in the light most favorable to the government" and must deny the motion if "taking the facts and the reasonable inferences therefrom, a rational jury could have found the defendant guilty beyond a reasonable doubt." *United States v. Lema*, 909 F.2d 561, 569 (1st Cir. 1990); *United States v. Rivera-Santiago*, 872 F.2d 1073, 1078-79 (1st Cir. 1989); *United States v. Paone*, 758 F.2d 774, 775 (1st Cir. 1985) (finding that same standard applied to circumstantial evidence cases). A judgment of acquittal terminates the prosecution, and double jeopardy attaches which bars further proceedings against the defendant for the same offense. *See Fong Foo v. United States*, 369 U.S. 662, 671 (1962).

B. Federal Rule of Criminal Procedure 33

A motion for a new trial pursuant to Rule 33 may be granted, upon motion by the defendant, if the trial court finds a new trial is "required in the interests of justice." FED. R.

CRIM. P. 33. Trial courts exercise wide discretion in ruling on Rule 33 motions. *See United States v. Leach*, 427 F.2d 1107, 1111 (1st Cir. 1970). They, however, should consider the harmless error standards of FED. R. CRIM. P. 52 and deny the motion unless the substantial rights of a defendant were impaired. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (finding that if the error involved denial of a constitutional right, a new trial is required unless the error was harmless beyond a reasonable doubt).

Prejudicial publicity which is harmful to a defendant is a ground for a new trial pursuant to Rule 30, *see, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965), but the mere existence of publicity does not, in itself, require a new trial. *See Patton v. Yount*, 467 U.S. 1025, 1035 (1984). The real issue is whether the defendant was prejudiced by the publicity. *See United States v. Anguilo*, 897 F.2d 1169, 1180 (1st Cir. 1990). In making such a determination, the trial court has substantial discretion. *See United States v. Drougas*, 748 F.2d 8, 29 (1st Cir. 1984).

C. Federal Rule of Criminal Procedure 34

Pursuant to Rule 34, a court may arrest judgment in two circumstances: (1) when the indictment fails to charge an offense; or (2) when the court lacks jurisdiction over the offense charged. *See* FED. R. CRIM. P. 34. In determining a motion for arrest of judgment, a court may only consider the record, which includes the indictment, the plea, the verdict, and the sentence. *See United States v. Sisson*, 399 U.S. 267, 281-82 (1970).

II.

Analysis

For efficiency's sake, we shall combine and discuss Defendants' contentions in the context of the three legal standards we have outlined above.

A. Rule 29 Contention

Defendant Garib alleges that we incorrectly admitted evidence that constituted unreliable hearsay of a codefendant. Defendant Garib maintains that admission of the ACHS Board of Directors' Minutes ("Minutes") violated his confrontation rights and impermissibly prejudiced him by falsely implicating his participation in fraudulent contracts.

We disagree with Defendant's contention because we find that the Minutes are business records of a corporation.[1] The Board of Directors' Minutes of a corporation constitute the records of regularly-conducted business activity, thereby qualifying as a hearsay exception. *See* FED. R. EVID. 803(6). We find that the Minutes constitute a business record because they documented what transpired at the Board meetings; they were transcribed by Dubón's secretary close in time to the actual meetings; Dubón's secretary testified at trial; they were transmitted by codefendant Dubón, a person with knowledge; and they were regularly kept in the normal course of operations at ACHS. The fact that some minutes may have been doctored while in the control of Dubón does not make them less admissible in the context of this trial.

B. Rule 33 Contentions

Defendant Garib contends that we erroneously instructed the jury on a number of matters, and both Defendants maintain that we erroneously denied their motions for a pretrial

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[1] A business record is a

> [m]emorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness.

Fed. R. Evid. 803(6).

change of venue which resulted in overwhelming prejudice that infected the impartiality of the trial.

Specifically, Defendant Garib alleges that we erroneously instructed the jury on: (1) jurisdiction with regards to receipt of federal funds under 18 U.S.C. § 666; (2) the definition of federal benefits under section 666; (3) the definition of authorized transaction by a private, for-profit corporation; (4) the statute of limitations' defense to section 666; and (5) the burden of proof in a perjury prosecution.

We begin by looking to the source of Defendant Garib's allegations. Prior to the conclusion of trial, both Defendants and the Prosecution submitted proposed jury instructions. After consideration of the proposals, we held three conferences with the attorneys in this case to discuss the jury instructions. All of the issues Defendant Garib is now raising were addressed and dealt with during those conferences.

Defendant's main contention seems to be the fact that we did not accept, verbatim, his proffered jury instructions. We are not obligated to do so. While it may constitute reversible error for a court to refuse to instruct the jury on a defendant's properly presented and accurate theory of the case, *see United States v. Leach*, 427 F.2d 1107, 1112 (1st Cir. 1970), "a court is under no compulsion to accept faulty instructions." *Id.* at 1113. Nor must a court adopt a defendant's proffered instruction in the precise language suggested, *see United States v. Coast of Maine Lobster Co.*, 557 F.2d 905 (1st Cir. 1977), even if it is a correct statement of the law. *See United States v. Grisson*, 645 F.2d 461 (5th Cir. 1981); *United States v. Linn*, 438 F.2d 456 (10th Cir. 1971). The crucial issue surrounding jury instructions is whether, "[t]aken as a whole, the charge was fair and impartial." *Leach*, 427 F.2d at 1112; *see also United States v. Barham*, 595 F.2d 231 (5th Cir. 1979) (finding no error in trial court's refusal to submit defendant's requested theory of defense instruction where actual instructions given impartially presented defendant's theory of the case). In this context, we address Defendant's allegations in turn.

1. **Jurisdiction Pursuant to Section 666**

Defendant Garib alleges that based upon the guilty verdict as to the perjury charge, the jury must have made factual findings that he participated in events which occurred in 1988, a time in which ACHS had not received federal funds. Therefore, Defendant maintains that we failed to instruct the jury on the proper jurisdictional parameters of section 666.

During at least one of our jury instruction conferences with counsel, we discussed the jurisdictional parameters of section 666, in particular the definition of the one-year period pursuant to the statute. At that time, we explained to Defense counsel that we interpreted the statute to proscribe the one-year period as a time which acknowledges the first receipt of federal funds by an organization and then requires the factfinder to count either forward or backward for as long as a twelve-month period. Our reading of section 666 accords with the plain language of the statute:

> [T]he term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. § 666(d)(5) (1994). We believe this to be the proper determination.

Since the Prosecution alleged receipt of federal program funds in 1989, the Center for Disease Control grant for which work was performed in 1988, we instructed the jury accordingly. We find no error in our instruction.[2]

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[2] The jury instruction at issue provided:

> The one-year period must begin no more than twelve months before the defendants committed these acts and must end no more than twelve months afterwards.

Docket Document No. 1226.

2. Definition of Federal Benefits Pursuant to Section 666

Defendants allege that since ACHS was a private, for-profit corporation, the federal funds received were the property of the owners of ACHS, a group that included Defendants. As such, Defendants maintain that the monies ACHS received did not constitute a federal benefit under section 666, and no federal offense could have occurred because the owners of the corporation were disbursing their own money. Furthermore, Defendants contend that they were operating under a fee-for-services agreement with the government, which precludes a finding of federal benefits.

This is not new ground. We have been dealing with these issues since Defendant Garib moved to dismiss his indictment and both Defendants moved to preclude the Prosecution from introducing evidence on similar grounds. Additionally, we spent a large portion of time during the jury instructions conferences addressing these issues. Nevertheless, we will briefly summarize our determinations in an effort to preserve the record fully.

Defendants' proposed jury instructions regarding federal benefits provided:

> Not every payment by the federal government to an organization constitutes federal "benefits" as required by the statute. Federal money paid to a private corporation as payment or fees for services already rendered by the corporation do not qualify as federal benefits. Similarly, payments made by the federal government to a private corporation as part of an ordinary commercial transaction do not qualify as federal benefits. Money paid to a corporation is a federal benefit if the corporation was required to "administer" the money under an agreement with the government or to "disburse" the money to others.

See Docket Documents Nos. 1209 and 1225. Defendants' requests are premised upon their enduring contention that federal money paid to a private corporation which performs a

service for the government can not constitute federal benefits.

We have disagreed, and continue to disagree, with such a contention. *See Docket Document No. 1066.* To summarize, we find that ACHS was not in a purely commercial relationship with the federal government. First, the contract between the Municipality of San Juan and ACHS provided that ACHS was to be the exclusive source of AIDS counseling and professional services in San Juan and that the Municipality maintained administrative and supervisory roles over ACHS. This fact alone clearly indicates more than a commercial relationship. Moreover, we find that the contractual relationship itself is a form of a federal assistance, supplying AIDS services under a federally financed program. *See United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) ("[O]rganizations engaged in contractual relationships with the federal government would fall within the scope of [section 666], if those 'contractual relationships constitut[ed] some form of Federal assistance.' ") (internal citations omitted). We instructed the jury accordingly.[3]

Finally, we find Defendants' proposed jury instructions to be incorrect as a matter of law in this case. The second sentence ("Federal money paid to a private corporation as payment or fees for services already rendered by the corporation do not qualify as federal benefits") is legally flawed as applied to the facts of this case. *Cf. United States v. Nichols*,

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[3] The jury instruction provided:

> To prove fraudulent embezzlement and theft, the government must prove the following elements beyond a reasonable doubt:
>
> . . . .
>
> Fifth, that the San Juan AIDS Institute and/or Advanced Community Health Serves, in a one-year period, received benefits of more than $10,000 under any Federal organization involving a grant, contract subsidy, loan guarantee, insurance or other assistance.

Docket Document No. 1226.

40 F.3d 999 (9th Cir. 1994) (finding federal statute included theft from organizations that provide government with some form of *quid pro quo*).

3. Definition of Authorized Transactions by a Private, For-Profit Corporation

This issue was the most hotly debated topic of our jury instruction conferences. Defendants maintain that since ACHS was a private, for-profit corporation during the relevant times for the indictment, the Board could authorize any expenditure and it would be legal.

Once again, we disagree. The relevant inquiry under section 666 is not who holds the authority, but rather whether the authority that is exercised is valid. Defendants refuse to acknowledge this self-evident fact, but that does not make it any less meaningful.

Congress enacted section 666 to "protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." S. REP. NO. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3812, 3511; *see also United States v. Foley*, 73 F.3d 484, 489 (2d Cir. 1996) ("By enacting section 666, Congress plainly decided to protect federal funds by preserving the integrity of the entities that receive the federal funds rather than requiring the tracing of federal funds to a particular illegal transaction."). To assert that if an entity was a private, for-profit corporation, as long as the Board, or whomever is the proper person, authorizes a particular expenditure it is necessarily legal, completely thwarts the purpose for which Congress enacted the statute.

Put another way, if the entire Board was corrupt, Defendants' argument would find that any action taken by it, even if contrary to the statutory purpose of section 666, is legal. We do not ascribe to such a view. *Cf. United States v. Salinas*, 654 F.2d 319, 328 (5th Cir. 1981) ("[W]hile valid consent by a bank's board of directors may be a defense to a charge of misapplication, no such board can vitiate a fraud on the bank. Thus, if the [defendants] . . . had an intent to

defraud, 'approval of the board of directors is no longer material to whether there was a misapplication of bank funds.' "). Rather, we agree with the Fifth Circuit's assessment in a similar situation:

> Patently an entire bank board, acting unanimously, could not without violating the statute invest bank funds to purchase a boatload of marijuana or make a loan secured only by a chattel mortgage on a kilogram of cocaine. Approval by the bank is a factor, indeed an important one, to be considered in deciding whether the making of the loan itself constituted a misapplication and whether a defendant had the intent to injure or defraud the bank required to sustain a conviction . . . [b]ut it is not a complete defense.

Id. at 1354. Therefore, while Board authorization may go to Defendants' intent, it does not insulate the Defendants from all blame.

Simply stated, if a den of thieves authorizes an illicit action, the action does not gain legitimacy by the fact that the authorization was performed by the proper persons. Rather, the proper inquiry is whether the authorization was valid or legitimate, *i.e.*, not contrary to the purposes of section 666 and, therefore, not illegal. This is necessarily so because a person or body, even by the most formal procedure possible, cannot authorize theft or embezzlement without violating the law. *See United States v. Stout*, No. 89-317-1-2-3, 1990 WL 136341, at *25 (E.D. Pa. Sept. 18, 1990) (citing *United States v. Cauble*, 706 F.2d 1322, 1353 (5th Cir. 1983)). Accordingly, we instructed the jury that the government had to prove beyond a reasonable doubt that "defendants, knowingly and without valid authority, embezzled, stole or obtained by fraud, some money or property." *Docket Document No. 1226.*[4]

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[4] Defendant Garib's proposed jury instructions erroneously asserted, in relevant part:

> To prove theft under 18 U.S.C. section 666, the government must prove that the expenditure was made without the con-

4. Statute of Limitations Defense to Section 666

Defendant Garib contends that our failure to instruct the jury that "a defendant's declaration of innocence when questioned by law enforcement, by itself, is not evidence of a defendant's continued participation in the conspiracy," constitutes grounds for a new trial. We did not give this instruction in the manner proposed by Defendant Garib because we fully covered the withdrawal defense in our instructions.[5] Defendant Garib was seeking to have us

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> sent of those who had the authority to approve the expenditure.

Docket Document Nos. 1209 and 1225; and Defendant Dubón's proposed jury instruction also incorrectly stated, in relevant part:

> If the Board of Directors of Advanced Community Health Services authorized an expenditure, then this expenditure was not theft or embezzlement.

Docket Document No. 1224.

[5] The relevant instruction provided:

> It is a defense to the charge of conspiracy to comit theft concerning programs receiving federal funds in Count One of the indictment that defendant Jorge L. Garib-Bazaín withdrew from the conspiracy before February 18, 1994.
>
> In order to withdraw from the conspiracy defendant Garib must take some definite, decisive, and affirmative action to disavow himself from the conspiracy or to defeat the goal or purpose of the conspiracy.
>
> Merely stopping activities or cooperation or merely being inactive for a period of time is not sufficient to constitute the defense of withdrawal.
>
> In deciding if defendant Garib took a step to disavow or, defeat the conspiracy, you may consider several factors including whether the defendant intentionally alerted law enforcement to the conspiracy, whether the defendant told others in the conspiracy that his participation had ended, whether the defendant took steps to correct prior assistance to the group, and whether the defendant attempted to rem-

expand upon the withdrawal instruction. We declined to do so, and now find that there was no error in our decision. *See Maine Lobster Co.*, 557 F.2d at 905; *Grissom*, 645 F.2d at 461; *Linn*, 438 F.2d at 456.

5. Burden of Proof in a Perjury Prosecution

Defendant Garib correctly notes that we instructed the jury that they needed to determine whether Defendant had "made the false material statements as detailed in the indictment," *see id.*, and, further, that truth is a defense to perjury. However, Defendant is incorrect in alleging that we did not instruct the jury that the Prosecution had the burden of proving the falsity of the statements. While Defendant Garib is correct concerning the allocation of the burden, we did not err in our instruction. In relevant portion, we instructed:

> [T]he government must prove the following four essential elements beyond a reasonable doubt:
>
> One: The defendant, Jorge L. Garib-Bazaín, gave testimony under oath before a federal grand jury;
>
> Two: The defendant, Jorge L. Garib-Bazaín, made the false material statements as detailed in the indictment during that testimony;
>
> Three: Defendant, Jorge L. Garib-Bazaín, knew that the statements were false when he gave the testimony; and
>
> Four: The statement or representation was material, meaning that it had a natural tendency to influence or was capable of influencing a decision or an action, whether or not it actually influenced or deceived anyone.

Docket Document No 1226. We find this to instruct the jury adequately as to 18 U.S.C. § 1623(a). *See United States v. Watson*, 623 F.2d 1198, 1204-05 (7th Cir. 1980) (finding similar charge adequately covered burden of proof issue).

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edy any past act, or attempted to prevent any further progress of the conspiracy.

Docket Document No. 1226.

6. Prejudicial Publicity

Defendants allege, pursuant to Rule 33, that we erred in denying their motion for a change of venue due to adverse prejudicial publicity prior to and throughout their trial. We have thoroughly examined the adverse publicity issues in our previous Opinion and Order, *see Docket Document No. 1019*, and discussed, at length, different aspects of this issue with counsel prior to and throughout the trial. We steadfastly stand behind our previous determinations and merely touch upon any issue not already addressed.

First, we unequivocally find that Defendants were not prejudiced by the publicity in this case. We conducted an individualized *voir dire* of the venire, asking each of them extensive questions concerning their exposure to pretrial publicity and allowing participation by counsel in the process. At the point of impanelment, counsel appeared to be satisfied with the jury selected. We also instructed the jury clearly and emphatically that they were not to listen to the radio, watch television programs, or read articles concerning this case. We repeated these instructions daily until the close of trial. Redacted newspapers were provided to the jury every day at court expense.

During the course of the proceedings, Defense counsel became concerned about a daily radio show, *Ojeda Sin Límite*, which had broadcast a show concerning the jury and the trial. In response to their concerns, we called the jury into an in-chambers conference and questioned whether any of them had heard the allegedly objectionable broadcast. All jurors resoundingly responded in the negative, and we noted that they looked either shocked or disgusted by our mention of the show.[6] Finally, during jury deliberations, Defense counsel again brought a questionable broadcast of the same show to our attention. We noted that it would have been impossible for the jurors to have heard the live broadcast as

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[6] We note that this was the only avenue for us to explore as we perceive any attempt at preemptively silencing the media as a restraint which unconstitutionally chills free speech in violation of the First Amendment. U.S. CONST. amend. I.

they were still involved in trial matters at the time it was aired, and again counseled that we were without power to control what the media aired.

The above situations constitute the only two instances of publicity, other than daily newspaper reports covering factual issues of the trial, which occurred during this trial. The jury was insulated from the media throughout the course of this trial, including during the airing of the two objectionable *Ojeda Sin Límite* broadcasts. Consequently, we do not find that Defendants were prejudiced in any way by this publicity.

C. Rule 34 Motions

Defendant Garib maintains that we lacked subject matter jurisdiction over the conspiracy charge alleged in Count 1 of the indictment, and both Defendants allege that the indictment failed to state a federal offense. We deal with these issues in turn.

Defendant Garib contends that the jury erroneously made factual findings that he had participated in events which occurred prior to ACHS' receipt of federal money and, therefore, no federal jurisdiction exists over the conspiracy count. This is not new ground as this issue really goes to the definition of a one-year period under section 666, which we have previously explored at length. *See supra* II(B)(1).

Finally, Defendants allege that the indictment fails to state a federal offense because any monies paid, during the relevant periods of the indictment, to ACHS were fees paid to a private corporation in return for services rendered. We also have explored this argument fully. *See supra* II(B)(2). Accordingly, Defendants' Rule 33 motions are denied.

D. Challenge to the Authority of the Interim United States Attorney

Defendant Garib renews his challenge to the authority of interim United States Attorney Guillermo Gil, in light of the recent opinion issued from another court in this district. *See United States v. Fermín Hilario*, Crim. No. 96-0016 (CCC) (D.P.R. Feb. 11, 2000). We deny Defendant's motion and

refer to our full explication in *United States v. Luciano del Rosario*, Crim. No. 99-097 (JAF) (D.P.R. Feb. 25, 2000).

III.

Conclusion

In accordance with the foregoing, we DENY Defendants' motions for judgment of acquittal, arrest of judgment and/or a new trial pursuant to Fed. R. Crim. P. 29, 33, and 44. This Opinion and Order disposes of *Docket Documents Nos. 1238 and 1241*.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 3rd day of March, 2000.

JOSE ANTONIO FUSTE
U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-2029

UNITED STATES,
Appellee,

v.

LUIS E. DUBON-OTERO,
Defendant-Appellant.

No. 00-2030

UNITED STATES,
Appellee,

v.

JORGE L. GARIB-BAZAIN,
Defendant-Appellant.

Entered July 23, 2002

Before BOUDIN, Chief Judge, *GIBSON, Senior Circuit Judge, **TORRUELLA, SELYA, LYNCH, LIPEZ and HOWARD, Circuit Judges.

ORDER OF COURT

We construe appellants' petitions for rehearing en banc as petitions for panel rehearing and for rehearing en banc. The

petitions for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petitions for rehearing and petitions for rehearing en banc be *denied*.

By the Court:
Richard Cushing Donovan, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

*Of the Eighth Circuit, sitting by designation.
**Judge Torruella is recused from these matters.

cc: Messrs. Srebnick, Roman, Hafetz, Friedman, Klumper, Vega-Pacheco

DEC 23 2002

Nos. 02-615 and 02-616

In the Supreme Court of the United States

LUIS E. DUBON-OTERO, PETITIONER

v.

UNITED STATES OF AMERICA

JORGE L. GARIB-BAZAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the requirement in 28 U.S.C. 1865(b)(2) and (3) that a person must have minimal proficiency in English in order to qualify for jury service deprived petitioners of their Sixth Amendment right to a jury pool composed of a fair cross-section of the community.

2. Whether an organization that received federal funds to establish community centers for the treatment of AIDS and drug addiction received "benefits * * * under a Federal program" within the meaning of 18 U.S.C. 666(b).

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In the Supreme Court of the United States

No. 02-615

LUIS E. DUBON-OTERO, PETITIONER

v.

UNITED STATES OF AMERICA

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JORGE L. GARIB-BAZAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a)[1] is reported at 292 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2002. Petitions for rehearing were denied on

[1] References to the petition appendix are to the appendix in No. 02-615.

July 23, 2002. Pet. App. 29a-30a. The petitions for a writ of certiorari were filed on October 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Puerto Rico, petitioners were convicted of conspiracy to embezzle property of an organization receiving federal funds, in violation of 18 U.S.C. 371 and 666. Petitioner Garib also was convicted of perjury before the grand jury, in violation of 18 U.S.C. 1623. The district court sentenced Garib to 60 months' imprisonment, fined him $10,000, and ordered him to pay $88,764 in restitution to the United States Department of Health and Human Services (HHS). The court sentenced petitioner Dubon to 60 months' imprisonment, fined him $125,000, and ordered him to pay $1,559,828 in restitution to HHS. The court of appeals affirmed.

1. Between January 1989 and February 1994, petitioners participated in a conspiracy to embezzle the property of the Advanced Community Health Services (Health Services). Health Services initially incorporated as a for-profit organization, but later became a non-profit corporation. Pet. App. 2a n.1. Petitioner Dubon, a lawyer, and petitioner Garib, a doctor, were shareholder-directors of the corporation. *Id.* at 2a. Garib served as Health Services' Medical Director, while Dubon served as legal counsel. *Ibid.* Dr. Yamil Kouri-Perez, a nominal "consultant" to Health Services, was actually in charge of the corporation's affairs. *Id.* at 2a-3a.

In January 1988, Health Services entered into a contract with the Municipality of San Juan under which

Health Services agreed to provide services for persons afflicted with AIDS. The Municipality agreed to pay Health Services $3.2 million per year for those services. Pet. App. 3a. Under the contract, Health Services became the exclusive source of AIDS counseling and professional services in San Juan. *Ibid.* As a result of that contract, Health Services began to receive federal funds. *Ibid.*

Before 1991, Health Services received federal funds to support an AIDS treatment and a drug addiction program. Pet. App. 8a; Gov't C.A. Br. 7. The program was funded as follows: The National Institute on Drug Abuse, a federal agency, provided a grant to Puerto Rico's Department of Anti-Addiction Services (DAAS). *Ibid.* DAAS transferred a portion of that grant to the Municipality of San Juan. *Ibid.* The Municipality, in turn, provided payments totaling $70,680 to Health Services to operate the program. *Ibid.*[2] After 1991, Health Services received hundreds of thousands of dollars per year in federal grant monies to conduct a wide variety of AIDS programs. *Ibid.*

Because the Municipality of San Juan had the authority to cancel Health Services' contract, petitioners used Health Services assets to purchase political support. Pet. App. 16a. Before the November 1988 election for mayor of San Juan, Garib gave mayoral candidate Jose Granados-Nevedo $100,000 in cash. *Ibid.* Granados-Nevedo lost the election to Hector Luis Acevedo, and the Municipality thereafter delayed payments on its

---

[2] Before 1991, Health Services also received federal funds to test members of the public for AIDS, and to conduct an AIDS education project. Pet. App. 8a. Health Services received payments totaling more than $22,000 for the testing project, and $100,000 for the education project. *Ibid.*

contract to Health Services. *Ibid.* To resolve that problem, Kouri arranged to pay Mayor Acevedo and the director of the Health Department of the Municipality $5000 each per month. *Ibid.* The Municipality then resumed making regular payments on the AIDS contract. *Id.* at 16a-17a. Petitioners raised the $10,000 monthly payments by issuing checks to persons who performed no services. *Id.* at 17a. Petitioners Garib and Dubon signed many of those checks. *Ibid.* Dubon's law firm also was involved in cashing a series of checks to divert Health Services funds to make those political payoffs. *Ibid.* In testimony before a grand jury, petitioner Garib falsely denied having any role in making political payoffs. *Id.* at 26a.

Between 1987 and 1991, petitioner Dubon also received $10,000 per month from Health Services as a legal retainer, although the board of directors had authorized a retainer of only $5000. Pet. App. 15a. Someone tampered with the board minutes to change the authorization from $5000 to $10,000. *Ibid.* Dubon diverted half of each $10,000 monthly payment to Kouri for the payment of Kouri's rent and credit card bills. *Ibid.* Kouri could not be on Health Services' payroll because he was under contract to the Harvard Institute for International Development. *Ibid.* Garib also diverted Health Services money to pay a personal housekeeper and a secretary for his private practice. *Ibid.*

2. Federal law requires the exclusion from jury service of any person who "is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form," and "is unable to speak the English language." 28 U.S.C. 1865(b)(2) and (3). Before trial, petitioners argued that those two exclusions violate the Sixth Amendment's fair cross-section requirement.

Based on controlling First Circuit precedent, the district court rejected that argument. See Pet. App. 31a-33a, 35a.

Section 666 applies to embezzlement of funds from any organization that receives, within one year before or after the violation, "benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). At trial, petitioners requested the following jury instruction to define "benefits" within the meaning of the statute:

> Not every payment by the federal government to an organization constitutes federal "benefits" as required by the statute. Federal money paid to a private corporation as payment or fees for services already rendered by the corporation do not qualify as federal benefits. Similarly, payments made by the federal government to a private corporation as part of an ordinary commercial transaction do not qualify as federal benefits. Money paid to a corporation is a federal benefit if the corporation was required to "administer" the money under an agreement with the government or to ["]disburse" the money to others.

Pet. App. 52a.

The district court rejected that requested instruction as an inaccurate statement of the law. See Pet. App. 52a-53a. Consistent with the text of the statute, the court instructed the jury that, in order to return a guilty verdict, the jury must find that Health Services received "in any one-year period benefits in excess of $10,000 under a federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance or other form of federal assistance." *Id.* at 19a-20a n.17.

The court further instructed that "[t]his section * * * does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed in the usual course of business. *Ibid.*

3. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. 1a-28a. The court of appeals rejected petitioners' contention that the English-proficiency requirements set forth in 28 U.S.C. 1865(b) deprived petitioners of their Sixth Amendment right to a jury composed of a fair cross-section of the community. Relying on circuit precedent, the court upheld the requirements based on the "the overwhelming national interest served by the use of English in a United States court." Pet. App. 28a (quoting *United States* v. *Aponte-Suarez*, 905 F.2d 483, 492 (1st Cir.), cert. denied, 498 U.S. 990 (1990)).

The court of appeals also rejected petitioners' contention that the evidence was insufficient to prove that Health Services received federal "benefits" before 1991. Pet. App. 7a-14a. The court held that Health Services had received "benefits" in the form of funds for an AIDS and drug treatment program that could be traced to a federal grant from the National Institute on Drug Abuse. *Id.* at 8a. The federal money reached Health Services by passing through the Commonwealth of Puerto Rico and the Municipality of San Juan. *Ibid.*

The court of appeals based its determination that Health Services received "benefits" on the following test set forth in *Fischer* v. *United States*, 529 U.S. 667 (2000):

> To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation, and purpose. The in-

> quiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program.

Pet. App. 9a-10a (quoting 529 U.S. at 681). Applying that test, the court of appeals concluded that Health Services received benefits for the same reason that the Court in *Fischer* had concluded that hospitals receive benefits under the medicare program. *Id.* at 11a-13a. The court reasoned as follows:

> One of the Institute's goals in making grants is to "insure care of good quality, in general community facilities." 21 U.S.C. § 1177(f). Under its contract with the Municipality, Health Services was the exclusive source of AIDS counseling and professional services in San Juan * * * supplying AIDS services under a federally financed program. * * * Therefore, the Institute would naturally intend its monies to assist Health Services in providing AIDS care, much as Medicare monies [involved in *Fischer*] assist hospitals in providing patient care.

Id. at 12a-13a (internal quotation marks omitted).

The court of appeals also concluded that "[i]t makes no difference that Health Services received this money indirectly." Pet. App. 13a. The court explained that "[i]t is now well established that benefits under § 666 are not limited solely to primary target recipients or beneficiaries." *Ibid.*

ARGUMENT

1. Petitioners contend (Dubon Pet. 9-23; Garib Pet. 27-30) that the requirement in 28 U.S.C. 1865(b)(2) and (3) that a person must have minimal proficiency in

English in order to qualify for jury service deprived petitioners of their Sixth Amendment right to a jury pool composed of a fair cross-section of the community. That contention is without merit and does not warrant further review.

In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), the Court held that the Sixth Amendment right to a jury trial includes a requirement that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538. In *Duren* v. *Missouri*, 439 U.S. 357 (1979), the Court clarified that, "[i]n order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Id.* at 364. Even if a defendant establishes a prima facie case, no constitutional violation has occurred if the challenged exclusion serves "a significant [government] interest [that is] manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Id.* at 367-368.

Petitioners assert (Garib Pet. 28) that they established a prima facie case by showing that an English proficiency requirement operates to exclude all persons who speak *only* Spanish. Assuming that persons who speak only Spanish constitute a "distinctive" group for purposes of the Sixth Amendment fair cross-section

requirement, an English proficiency requirement is nonetheless constitutional because it manifestly advances significant government interests. Most important, if jurors do not speak a common language, they cannot communicate among themselves, and communication is essential if jurors are to perform their deliberative function.

Petitioners assert (Dubon Pet. 17-19; Garib Pet. 29-30) that the use of translators can ensure effective communication among jurors who speak different languages. But, as this Court recognized in *United States* v. *Olano*, 507 U.S. 725 (1993), the presence of non-jurors in the jury room during deliberations "contravene[s] 'the cardinal principle that the deliberations of the jury shall remain private and secret.'" *Id.* at 737 (quoting Fed. R. Crim. P. 23(b) advisory committee's notes). It also creates a serious risk that the course of deliberations will be influenced in ways that would be impossible to detect. See 507 U.S. at 742 (Kennedy, J., concurring) (finding it "most difficult * * * to show the absence of prejudice" from the presence of a thirteenth person in the jury room, because of "certain premises about group dynamics that make it difficult for us to know how the jury's deliberations may [be] affected.").

Acceptance of petitioners' theory that an English proficiency requirement violates the fair cross-section requirement would also have far-reaching consequences. Many cities in this country contain several different groups that are unable to speak English and that speak another language exclusively. If the jury venire must include all such groups in order to ensure that the jury pool includes a fair cross-section of the community, some chosen juries would likely require multiple translators. A jury composed in that way

could not engage in the secret, deliberative process historically associated with a petit jury.

In addition, as the First Circuit has observed, "[f]ederal district courts in part are designed to provide trial alternatives for litigants, resident and nonresident, who seek the uniformity, expertise, and familiarity that they believe they may find in a national rather than a local forum." *United States* v. *Benmuhar*, 658 F.2d 14, 20 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982). An English proficiency requirement "is both symbolically and functionally significant in achieving this goal." *Ibid.*

Those considerations fully justify a requirement that jurors possess proficiency in English. The court of appeals therefore correctly rejected petitioners' fair cross-section claim.

2. a. Petitioners contend (Dubon Pet. 23-26; Garib Pet. 11-19) that the court of appeals' standard for determining whether an organization receives federal "benefits" within the meaning of Section 666 conflicts with this Court's decision in *Fischer*. In finding that Health Services received federal benefits in the form of federal funding from the National Institute for Drug Abuse, however, the court of appeals expressly applied the standard set forth in *Fischer*. Pet. App. 9a-13a. In particular, the court correctly drew from *Fischer* the principle that a court must examine the "structure, operation, and purpose" of the relevant program to determine whether funds received by an organization are simply reimbursements for services rendered in the ususal course of business, or instead are federal benefits that are intended to further a broader public purpose. *Id.* at 9a-10a. The court further understood that, under *Fischer*, funding does not lose its character as a benefit simply because the ultimate beneficiary of

the program is someone other than the recipient of federal funds. *Id.* at 10a. And the court also recognized that the Court in *Fischer* had not endorsed the view that "all that was required for funds to constitute benefits * * * was to establish that they came from a federal program." *Id.* at 11a.

Petitioners argue (Dubon Pet. 23-26; Garib Pet. 11-19) that the court of appeals misapplied those principles, and that an examination of the program at issue in this case shows that the funds received by Health Services to operate an AIDS and drug treatment program were merely reimbursement for services rendered in the ordinary course of business and not federal benefits. But that question is entirely fact-bound; it therefore does not warrant this Court's review.

In any event, the court of appeals correctly concluded that, just as the hospitals in *Fischer* received benefits, Health Services received benefits here. In *Fischer*, the Court concluded that medicare payments to hospitals constitute benefits because "[t]he payments are made not simply to reimburse for treatment of qualifying patients but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community." 529 U.S. at 679-680. Similarly, the statutory program under which Health Services received federal funds to serve AIDS patients and drug addicts was designed to "insure care of good quality, in general community care facilities." 21 U.S.C. 1177(f). Payments were not made under the program simply to compensate Health Services for specific individual services on a patient-by-patient basis. And, because "[u]nder its contract with the Municipality, Health Services was the 'exclusive source of AIDS counseling and professional services in San Juan,'" *ibid*, the fund-

ing from the Institute "assist[ed] Health Services in providing AIDS care, much as Medicare monies assist hospitals in providing patient care." *Id.* at 13a.

There is an additional reason that petitioners' challenge to the application of *Fischer* to the facts of this case does not warrant review. Health Services did not receive benefits only under the program identified by the court of appeals. Health Services also received funds after February 1991 under a variety of other programs. Petitioners conceded in the court of appeals that the federal monies Health Services received after 1991 were "benefits" under Section 666. Pet. App. 8a, 20a n.19.

The jury was not instructed to base its verdict on petitioners' post-1991 conduct alone, and petitioners, relying on *Yates* v. *United States*, 354 U.S. 298, 312 (1997), therefore argue that the conviction cannot stand based on that conduct alone because the conviction might have rested on pre-1991 conduct. See Pet. App. 7a. But, as the government argued in the court of appeals, *ibid.*, more recent authority from this Court permits harmless error review when the jury verdict would have been the same absent the alleged instructional error. See *Neder* v. *United States*, 527 U.S. 1 (1999) (guilty verdict may be upheld on appeal even if the jury was not properly instructed on an element of an offense, if any rational jury would have convicted defendant if instructed properly).[3] Here, any rational jury that found that petitioners were members of the charged conspiracy in 1989 would necessarily

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[3] The court of appeals did not reach the question of how *Neder* affects the analysis under *Yates* because it held that the pre-1991 payments were "benefits," so there was no instructional error. Pet. App. 7a n.5.

have found that they remained members through 1994. In those circumstances, any error in failing to instruct the jury to base its verdict exclusively on petitioners post-1991 conduct was at most harmless error.

b. Petitioners' remaining challenges to their convictions under Section 666 also do not warrant review. Petitioners contend (Garib Pet. 16) that Health Services did not receive benefits within the meaning of Section 666 before 1991, because it did not receive funds directly from a federal agency, but instead received the funds after they passed through the Commonwealth of Puerto Rico and the Municipality of San Juan. But as the court of appeals explained, Section 666 does not draw a distinction between those entities that receive funding directly and those that receive federal funding indirectly through intermediaries. Pet. App. 13a. *Fischer* itself makes clear that an entity that receives federal funds indirectly through an intermediary is covered by Section 666. As the Court noted in *Fischer*, hospitals that participate in the medicare program often receive federal funds through intermediaries. *Fischer*, 529 U.S. at 677.

In suggesting that entities that receive funding indirectly are not covered by Section 666, petitioners mistakenly rely (Garib Pet. 14-17, 20-21) on *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), and *NCAA* v. *Smith*, 525 U.S. 459 (1999). Those cases interpret statutes that prohibit discrimination in federally assisted programs; they do not interpret Section 666. To the extent that those cases are relevant in construing Section 666, however, they support the conclusion that Health Services is a covered entity under Section 666. Under *Paralyzed Veterans* and *NCAA*, entities are covered by the nondiscrimination statutes if they

"receive federal assistance, whether directly or through an intermediary." *NCAA*, 525 U.S. at 468. Entities are not covered if they "only benefit economically from federal assistance" provided to others. *Ibid.* Health Services falls into the former rather than the latter category. It received federal assistance through intermediaries—the Commonwealth of Puerto Rico and the Municipality of San Juan; it did not merely benefit from assistance provided to others.

Petitioners also err in contending (Garib Pet. 19-21) that the decision below conflicts with court of appeals decisions holding that Section 666 does not apply to purely commercial transactions between the federal government and private organizations. The court of appeals expressly recognized that purely commercial transactions do not trigger coverage under Section 666. Pet. App. 10a n.8, 14a. But it concluded that, like medicare payments to hospitals, federal payments to Health Services for AIDS services and drug addiction did not constitute mere commercial transactions. Instead, they constituted benefits that were intended to serve the government's interest in quality patient care. *Id.* at 12a-14a.

Finally, petitioners argue (Dubon Pet. 26-29; Garib Pet. 21-24) that the decision below conflicts with decisions of the Second and Third Circuits holding that Section 666 requires proof that the charged misconduct implicates a federal interest. See *United States* v. *Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999); *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999). Petitioners, however, did not raise that contention in the court of appeals, and the court of appeals therefore did not address whether Section 666 contains such a requirement. That question is therefore not properly presented here.

In any event, petitioners' conduct plainly implicated a federal interest. By misappropriating money from Health Services, petitioners threatened the integrity of the federal funded programs operated by Health Services. Here, as in *Fischer*, petitioners "raise[d] the risk" that the target of their misconduct would "lack the resources requisite to provide the level and quality of care envisioned by the program." 529 U.S. at 681-682.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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JORGE L. GARIB BAZAIN,

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v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The Solicitor General is wrong to suggest that the sharp conflict between the decision below and this Court's decision in *Fischer* v. *United States*, 529 U.S. 667 (2000), is really no conflict at all. According to the Solicitor General, no conflict exists because the First Circuit purported to have "expressly applied the standard set forth in *Fischer*." Opp. 10. The question presented by the petition, however, is not whether the Court of Appeals accurately cited *Fischer* and the test that decision established for determining whether an entity "receives" federal "benefits"—of course it did—but whether the rule the First Circuit adopted—that entities *necessarily* become recipients of federal benefits whenever they are paid with funds that can be traced to a federal grant—conflicts with the principles this Court established in *Fischer*.

On that question—which, contrary to the Solicitor General's passing assertion, Opp. 11, is purely legal, not "entirely fact-bound"—the government's response is notable for what it does not say. For one thing, the Solicitor General neglects to quote—much less defend—the operative language of the First Circuit's unprecedented legal rule. The Solicitor General notes that the First Circuit found that "the statutory program under which [ACHS] received federal funds to serve AIDS patients and drug addicts was designed to 'insure care of good quality, in general community care facilities,' " *id.* at 12 (quoting 21 U.S.C. § 1177(f)), but fails to mention that, from this premise, the Court of Appeals adopted a startling legal assumption: that the federal government, in making a grant, "would naturally intend its monies to assist" all entities that ultimately render services in furtherance of the grant program, so that those entities become "recipients" of federal "benefits" whenever they are paid with funds that can be traced to a federal grant. Pet. App. 12a.

In refusing to address the First Circuit's novel rule, the Solicitor General not surprisingly makes no effort to reconcile the Court of Appeals' boundless standard with the narrow definition of "benefits" this Court adopted in *Fischer*. As we emphasized in the petition (pp.13-14), this Court held in *Fischer* that "[t]he noun 'benefit' means 'something that guards, aids, or promotes well-being.' " 529 U.S. at 677-678 (quoting Webster's Third New International Dictionary 204 (1971)). Hospitals participating in Medicare thus receive benefits because the money they get represents more than the market value of their services; it also includes additional "aid" to cover "overhead costs[] and education costs" so that "providers possess the capacity to render, on an ongoing basis, medical care to the program's qualifying patients." *Id.* at 680.

The First Circuit's rule—that an organization receives "federal benefits" whenever it is reimbursed with federal-source funds for services that in some way promote the

federal program's objectives—fundamentally departs from *Fischer* by substituting a blanket assumption about what the federal government *intends* for an analysis into what the federal government actually *provides*. The pertinent question under *Fischer* is not whether the federal government hoped that its grant money would be used to retain subcontractors that would promote the program's goals; that is, after all, presumably the hope of every agency. Rather, the proper focus is on whether the federal government buttressed that aspiration with additional "aid." We made this point in the petition (pp.13-14), and the Solicitor General tellingly makes no effort to identify any additional "aid" that subcontractors such as ACHS must receive under the First Circuit's rule to qualify as recipients of federal "benefits."

Nor does the Solicitor General deny the far-reaching consequences of the First Circuit's new rule. We indicated in the petition (pp.18-19) that the decision below would transform not only remote subcontractors like ACHS into recipients of federal benefits but also those subcontractors' vendors (and the vendors' sub-vendors, and so on, *ad infinitum*) whose services necessarily help the subcontractors advance the agency's mission. That the Solicitor General says not a word to the contrary confirms that the First Circuit's rule "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Fischer*, 529 U.S. at 681.

2. In the petition (pp.14-18), we explained that the First Circuit's decision conflicts with not only *Fischer* but also *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459 (1999), and *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), both of which construed analogous federal-funding triggers in statutes enacted—like § 666—pursuant to the Spending Clause. We argued that the First Circuit's rule—that every entity paid with money originating in a federal grant is necessarily a recipient of federal benefits—fundamentally

diverges from this Court's holding in *Paralyzed Veterans* that recipient status under statutes with federal-funding triggers is limited to "those who receive the aid, but does not extend as far as" entities that merely derive some economic advantage from it. *Paralyzed Veterans*, 477 U.S. at 607. We went on to explain that, by extending federal criminal jurisdiction to entities that merely profit from government largesse, the Court of Appeals adopted a rule that "yield[s] almost 'limitless coverage.' " *NCAA*, 525 U.S. at 467 (quoting *Paralyzed Veterans*, 477 U.S. at 608).

Rather than join issue, the Solicitor General mischaracterizes our argument as being nothing more than an objection to extending § 666 jurisdiction to entities "that receive funding indirectly." Opp. 13. That, of course, is not what we said, and the Solicitor General not surprisingly has little difficulty knocking down its straw man. It is well established that an entity can receive federal benefits either directly from the federal government or through an intermediary. *See Fischer*, 529 U.S. at 677; *NCAA*, 527 U.S. 468. That does *not* mean, however, that every entity that indirectly *profits* from a federal government outlay is an indirect *recipient* of federal benefits. As we explained in the petition (p.16), while this Court has "recognized that most federal assistance has 'economic ripple effects,' " it has "rejected the argument that those indirect economic benefits can trigger statutory coverage." *Paralyzed Veterans*, 477 U.S. at 607 (quoting *Grove City College* v. *Bell*, 465 U.S. 555, 572 (1984)).

By ignoring the argument actually presented in the petition, the government offers no explanation for why the federal-funding trigger in § 666—a criminal statute, after all—should be significantly *broader* than the analogous civil antidiscrimination statutes at issue in *NCAA* and *Paralyzed Veterans*. As we demonstrated in the petition (pp.17-18), since both statutory regimes were enacted pursuant to the Spending Clause and because Congress employed nearly identical language in the two, there is no reason the jurisdic-

tional reach of one (the criminal provision) should dramatically extend beyond the other (the civil). The First Circuit's rule fosters precisely that asymmetry and the Solicitor General does not suggest otherwise.

3. The Solicitor General also sidesteps the glaring conflict we identified in the petition (pp.19-21) between the First Circuit's decision and those of its sister circuits holding that § 666 does not extend to entities that enter into commercial transactions with the government. Opp. 14. The Solicitor General maintains there is no conflict because the Court of Appeals concluded that the two lump-sum payments ACHS received were not "mere commercial transactions," but were instead "benefits" because they "were intended to serve the government's interest in quality patient care." *Id.* This explanation underscores precisely why the First Circuit's rule is fatally flawed. If "recipient" status turns on nothing more than whether the government hoped that its money would be paid to entities down the line that would "serve the government's interest"—without requiring any independent showing that the federal government gave the entity some additional "aid," as *Fischer* requires—then even "mere commercial transactions" will become fair game under § 666. That, however, reduces the jurisdictional inquiry under § 666 to a "level of generality" this Court expressly rejected in *Fischer*, 529 U.S. at 681, and dramatically expands federal criminal jurisdiction under the Spending Clause.

4. The Solicitor General does not deny the entrenched circuit split we identified in the petition (pp.21-24) over the question whether, in a § 666 prosecution, the Spending Clause requires proof of some nexus between the allegedly corrupt transaction and the federal interest underlying the expenditure of funds. That tacit concession is wise, since the Solicitor General has elsewhere acknowledged that "[t]here is currently a divergence of views among the circuits on whether Section 666 requires the government to prove a connection between the defendant's criminal acts and some

federal programmatic interest." U.S. Br. in Opp'n, *Suarez* v. *United States*, No. 01-7509, at 9 (2002). This candid survey of the courts of appeals perhaps also explains why the Solicitor General does not dispute the importance of the question presented or the frequency with which it arises in the federal courts. *See* Pet. 25-26.

The Solicitor General nevertheless maintains that the argument was not pressed below and that we are therefore precluded from raising it here. The Solicitor General is wrong. Quoting from the leading case adopting a federal-nexus requirement, we argued below that " '[t]o pass muster under the Spending Clause, legislation regulating behavior of entities receiving federal funds must, among other things, be based upon a federal interest in the particular conduct.' " Br. of Jorge Garib Bazain, *United States* v. *Garib Bazain*, No. 00-2030 (1st Cir.) at 45 (quoting *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999)). But in any event, the Solicitor General's objection confuses *arguments* with *claims*. This Court has consistently held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). *See Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 78 n.2 (1988); *Illinois* v. *Gates*, 462 U.S. 213, 219-220 (1983); *Dewey* v. *City of Des Moines*, 173 U.S. 193, 197-198 (1899). The argument that the First Circuit's rule improperly converts countless cases of localized theft and bribery into federal criminal prosecutions based on the slightest—if any—showing of an actual federal interest is "not a new claim within the meaning of [the] rule, but * * * support[s] what has been [our] consistent claim": that the First Circuit's expansive view of § 666 exceeds the limits of the Spending Clause. *Lebron*, 513 U.S. at 379.

On the merits of this question, the Solicitor General suggests there is an ample federal interest here because "petitioners 'raised the risk' that the target of their misconduct

would 'lack the resources requisite to provide the level and quality of care envisioned by the program.' " Opp. 15 (quoting *Fischer*, 529 U.S. at 681-682) (brackets omitted). But again this explanation proves too much, for if there is a federal interest in deterring Dr. Garib from placing his housekeeper on the ACHS payroll, then there surely is a federal interest in policing the affairs of every entity paid with federal-source funds to provide a service that in some way contributes to "the level and quality of care envisioned by the program"—from the syringe manufacturers to the companies that publish the health-care brochures distributed to clinic patients. Yet to say that this constitutes an adequate federal nexus is effectively to do away with any federal nexus requirement. This Court should grant certiorari to resolve this intractable circuit split.

5. The Solicitor General finally resorts to the last refuge of the government in a criminal case by suggesting that any error the First Circuit committed was harmless. Opp. 12-13. Not so. The Solicitor General emphasizes that, despite disagreements over whether the money ACHS received before 1991 constituted federal benefits under § 666, all parties recognized that ACHS did, in fact, begin receiving federal benefits in early 1991 when it reincorporated as a non-profit entity. But, as the Solicitor General concedes, "[t]he jury was not instructed to base its verdict on petitioners' post-1991 conduct alone." Opp. 12.

Invoking *Neder* v. *United States*, 527 U.S. 1 (1999), the Solicitor General nevertheless invites this Court to look past the jury's verdict and decide for itself that "the jury verdict would have been the same absent the alleged instructional error." Opp. 12. But *Neder*'s harmless error standard is wholly inapplicable here. That is because, under *Neder*, an instructional error is deemed "harmless" only "where a reviewing court concludes beyond a reasonable doubt that the omitted element was *uncontested* and supported by *overwhelming* evidence." *Neder*, 527 U.S. at 17 (emphases

added). Here, although the government conclusorily asserts that "any rational jury that found that petitioners were members of the charged conspiracy in 1989 would necessarily have found that they remained members through 1994," Opp. 12-13, Dr. Garib proffered substantial evidence demonstrating that he had withdrawn from any alleged conspiracy by 1990. On the same day that ACHS reincorporated as a non-profit entity, Dr. Garib—whose salary stood to be halved as a result of the change in status—resigned from the board of directors and ceased any involvement with the administration of ACHS. Dr. Garib thus "contested the omitted element and raised evidence sufficient to support a contrary finding." *Neder*, 527 U.S. at 19. That alone disposes of the government's harmless-error argument.

6. In opposing the second question presented by the petition—whether systematically excluding non-English speakers from juries in Puerto Rico violates the Sixth Amendment's fair cross-section guarantee—the Solicitor General contends that "the presence of non-juror[] [interpreters] in the jury room during deliberations" would undermine the traditional secrecy of jury deliberations and possibly "create[] a serious risk that the course of deliberations will be influenced in ways that would be impossible to detect." Opp. 9. Federal and state practice, however, belies the government's concerns.

In *United States* v. *Dempsey*, 830 F.2d 1084, 1090-91 (10th Cir. 1987), the Tenth Circuit allowed a sign-language interpreter to assist a deaf juror during trial and deliberations, and in doing so rejected the same concerns the government advances here. It found any objection to the loss of secrecy unfounded because "an interpreter may be even less likely than a juror to reveal the confidences of the jury room." *Id.* at 1090. Similarly, the court disagreed that the presence of an interpreter would "inhibit discussion" or otherwise create an "inhibiting influence" on the jury. *Id.* at 1091.

Further undermining the government's objections, a number of States have enacted legislation expressly providing that "[i]f any juror is deaf or hearing impaired, such juror shall have the assistance of a qualified interpreter who shall be present throughout the proceeding and when the jury assembles for deliberation." Conn. Gen. Stat. Ann. § 51-245(d). *See, e.g.*, Ill. Rev. Stat. ch.110, § 8-1402; La. Code Crim. Proc. Ann. art. 401.1(B). These legislative and judicial determinations at both the state and federal level demonstrate that the government's fears are vastly overstated. In any event, as the Tenth Circuit in *Dempsey* concluded, "an important social policy argues against automatically foreclosing members of an important segment of our society from jury duty simply because they must take an interpreter into the jury room." 830 F.2d at 1091.

The Solicitor General's only other argument is that, given the great linguistic diversity in "[m]any cities in this country," adopting "petitioners' theory that an English proficiency requirement violates the fair cross-section requirement" would mean that "some chosen juries would likely require multiple translators." Opp. 9. That, the government maintains, would likewise intrude on the "secret, deliberative process historically associated with a petit jury." *Id.* at 10.

Again, the Solicitor General's concerns are greatly exaggerated. The jury-exclusion question presented by the petition is limited to Puerto Rico, which is the *only* majority-Spanish-speaking federal district in the United States. Indeed, an overwhelming 98% of Puerto Ricans speak Spanish. It is also the only Commonwealth or State that conducts its own judicial proceedings in Spanish. Thus a rule specifically tailored to Puerto Rico's unique history and linguistic demographics will hold at bay the parade of horribles conjured up by the Solicitor General.

* * * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

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